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Section 8(a)(3) of the National Labor Relations Act (hereinafter NLRA or the Act) prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[1] Proving a violation of this section generally requires evidence that an employer has treated an employee differently in regard to hiring or conditions of employment, and that the different treatment was motivated by an intent to encourage or discourage union membership.[2] The employer's motive for engaging in the differential treatment is a central issue in most 8(a)(3) cases.[3]

In some circumstances, however, the employer's conduct speaks for itself. "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."[4]

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1. 29 U.S.C §158(a)(3)(1982), provides, in pertinent part, that "it is an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

2. The term "union membership" as used in the statute has been broadly defined to include not only the act of becoming and remaining a union member, but also the type of union member an individual is, *i.e.* whether an individual is a good or bad member or whether an individual engages in union activities. Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954). As used in this article, the term union membership includes all of the above activities.

3. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965):

> Under the words of the statute [§8(a)(3)] there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. . . . Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization.

4. *Radio Officers'*, 347 U.S. at 45.

The employer is held to have intended the naturally foreseeable consequences of its conduct. The act itself establishes motive; a labor law version of res ipsa loquitur. This concept has been labeled "inherently discriminatory conduct."[5]

As a matter of proof, therefore, violations of §8(a)(3) are easier to prove in cases involving inherently discriminatory conduct. Once it is proven that the employer engaged in inherently discriminatory conduct, the National Labor Relations Board (hereinafter the Board) can find a violation of §8(a)(3) without the need of a separate finding related to the employer's motive.[6] Where inherently discriminatory conduct is not present, finding a violation of §8(a)(3) is dependent upon proof that the employer engaged in discriminatory conduct *and* that its purpose in doing so was to encourage or discourage union membership.[7] Thus, a determination that an employer's conduct falls within the inherently discriminatory doctrine can be dispositive of the issue of whether §8(a)(3) has been violated.[8]

While the Supreme Court has developed this doctrine, it has not precisely defined its contours, leaving the Board, the Courts of Appeal, and even the Supreme Court itself to struggle with the applicability of the doctrine to specific employer conduct on a case-by-case basis. One is often left with the feeling that attempts to define inherently discriminatory conduct, like attempts to define obscenity, may never be completely successful, but that experienced labor lawyers

5. *See* NLRB v. Erie Resistor Corp., (discussing inherently discriminatory conduct). 373 U.S. 221, 228 (1963). Because *Erie Resistor* uses both the term destructive as well as discriminatory in describing employer conduct, some courts and commentators refer to this as "inherently destructive" conduct. As will be shown, however, inherently destructive conduct is a subset of the inherently discriminatory doctrine.

6. *See generally Erie Resistor*, 373 U.S. 221 (wherein such a finding was made).

7. *Id.*

8. It is this determination which forms the basis for the differing results reached by the Board majority and dissent in *Harter Equip., Inc.*, 280 N.L.R.B. 597 (1984), *aff'd sub nom, Local 825, Int'l Union of Operating Eng'rs v. NLRB*, 829 F.2d 458 (3d Cir. 1987). The majority concluded that the employer's conduct, while inherently discriminatory, did not rise to the level of inherently destructive; therefore, in view of the failure to prove an anti-union motive in the face of evidence of legitimate and substantial business justification for the conduct, the employer did not violate §8(a)(3). 280 N.L.R.B. at 599. The dissent, on the other hand, found the employer's conduct both inherently discriminatory and destructive and thus in violation of §8(a)(3). *Id.* at 603-04; *see also Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). In this case, decided under the Railway Labor Act, the majority rejected the attempt to label the employer's conduct inherently destructive and found no violation of the statute. 489 U.S. at Justices Brennan and Marshall, in dissent, would have found a violation based on their characterization of the employer's conduct as inherently destructive. *Id.*

know it when they see it.[9] Nevertheless, this article will trace the development of the doctrine, propose some guidelines for determining when employer conduct falls under the rubric of the inherently discriminatory doctrine, and analyze two recent cases[10] dealing with employer use of temporary replacements during offensive lockouts in light of the proposed guidelines.

I. DEVELOPMENT OF THE INHERENTLY DISCRIMINATORY DOCTRINE

In the first case decided by the Supreme Court under the newly-enacted NLRA,[11] the Court was faced with a challenge to the constitutionality of the statute on many fronts, one of which was the employer's assertion that the Board's reinstatement and backpay order, issued as a result of finding a violation of §8(a)(3),[12] "constitutes an unlawful interference with the right of the [employer] to manage its own business."[13] The Court rejected this argument, noting:

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The *true purpose* is the subject of investigation. . . .[14]

Thus, from the outset, the importance of motive to finding a violation of §8(a)(3) was established.[15]

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9. *Cf* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing that Justice Stewart states he would know when he saw it).

10. Harter Equip., Inc., 280 N.L.R.B. 597 (1984), *aff'd. sub nom.* Local 825, Int'l Union of Operating Eng'rs v. *NLRB*, 829 F.2d 458 (3d Cir. 1987); Int'l Bhd. of Boilermakers v. NLRB, 858 F.2d 756 (D.C. Cir. 1988).

11. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

12. Section 8(3) of the NLRA as enacted in 1935 was the predecessor to §8(a)(3) of the Act as amended. The wording relating to the prohibition of discrimination in employment to discourage union membership was not changed.

13. *Jones & Laughlin*, 301 U.S. at 20 (summarizing argument of respondent-employer).

14. *Id.* at 45-46 (emphasis added); *see also Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 682-84 (1961) (Harlan, J., concurring) (discussing the legislative background of §8(a)(3)).

15. *See generally* Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1

Direct evidence of the employer's motive is seldom available, however. Rare is the employer who admits, "Yes, I fired you because you joined the union." The more usual circumstance involves the employer who asserts a legitimate business reason for its conduct. Case law thus developed types of indirect evidence from which a trier of fact could infer an employer's motive.[16] Examples of such indirect evidence are: condonation,[17] comparative treatment,[18] departure from routine[19] or false[20] or inconsistent[21] explanations.

(1947); Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965); Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L. REV. 491 (1967) (discussing the meaning and role of motive in §8(a)(3)).

16. *See, e.g.*, McGraw-Edison Co. v. NLRB, 419 F.2d 67, 75 (8th Cir. 1969). "The Board, of course, may base its finding on circumstantial as well as on direct evidence." 419 F.2d at 75. "Intent and motive are subjective and often may be proved only by circumstantial evidence." *Id.*

17. The classic case relying on condonation for proof of motive is *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943). The work history of the discriminatee, Walter Weigand, revealed that he reported to work drunk, arrived at and left work as he pleased, brought a woman (known as the Duchess) to work and "introduced" her to several of the workers, and punched the time cards for other workers. *Id.* at 90. Management was aware of Weigand's conduct; not only did they refuse requests by his supervisor to fire him, but they gave him five raises. Within two days of management's discovery that Weigand was involved with the CIO, however, he was fired. The court refused to credit the employer's assertion that the discharge was motivated by the accumulation of unacceptable behavior on Weigand's part. Rather, the court found that his unacceptable behavior had been condoned. *Id.* Based on the employer's knowledge of Weigand's CIO activities, the timing of the discharge in relation to the employer's knowledge, and the employer's condonation of the stated reason for discharge, the court held that the Board could decide that the employer's real motive was to discourage activity on behalf of the CIO. *Id.* at 90-91.

18. *See, e.g.*, Mikami Bros., 188 N.L.R.B. 522 (1971). The employer in *Mikami Bros.*, claimed it discharged the discriminatee because her paycheck had been subjected to garnishment on two occasions. *Id.* at 525. Another employee, however, who had also suffered two garnishments only one month previous, had not been discharged. *Id.* at 526. The administrative law judge concluded that the employer's "reason for the discharge does not withstand scrutiny when compared with its much laxer treatment of an equal offender. . .." *Id.*

19. *See, e.g.*, Tendico, Inc., 232 N.L.R.B. 735 (1977). The employer in *Tendico, Inc.*, maintained a progressive system of discipline but discharged the discriminatee, allegedly for poor work performance, without any prior warning or discipline. *Id.* at 747-46. The administrative law judge noted that the employer's "sudden decision to discipline [the discriminatee] with the ultimate discipline of discharge without prior written warning and a disciplinary layoff of 3 working days as prescribed by its normal practice became inexplicable unless one considers some other reason or motivation." *Id.* at 748.

20. *See, e.g.*, Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466 (9th Cir. 1966). The employer in *Shattuck* challenged the Board's finding of an 8(a)(3) violation, claiming that it discharged the discriminatee for failure to obey his supervisor's orders. *Id.* at 468. The court found there was substantial evidence to support a finding that the employee did not in fact refuse to obey the order. In enforcing the Board's finding of a violation, the court held:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances

The Second Circuit Court of Appeals developed another method for inferring an employer's illegal motive, finding that in some circumstances the employer's conduct in and of itself can create such an inference, based on the theory that the employer intends the natural result of its conduct.[22] Other courts of appeals rejected this method, requiring evidence specifically directed to the issue of whether the employer intended its conduct to discourage union activity.[23] The Supreme Court was called upon to resolve this circuit conflict in *Radio Officers' Union v. NLRB*.[24] The question presented, as framed by the union in its petition for certiorari, was "[m]ay a finding that discrimination was practiced for the purpose of 'encourage membership' be predicated upon an assumption that discriminatory conduct constitutes 'inherent' encouragement of membership?"[25]

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proved. . . .If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal — an unlawful motive. . . .

Id. at 470.

21. *See, e.g.*, Rockingham Sleepwear, Inc., 190 N.L.R.B. 472 (1971), *enforced per curiam* 81 LRRM 2132 (4th Cir. 1972). Here, the employer initially claimed the discriminatee had quit. 190 N.L.R.B. at 473. Subsequently, the employer told the state unemployment compensation agency that the discriminatee was laid off for poor attendance. Lastly, the employer stated that the discriminatee's poor attitude had caused her not to be recalled. *Id.* The administrative law judge found a violation of §8(a)(3) noting that "the inference to be drawn from these sham and shifting explanations is that [the employer] discharged and refused to reinstate [the discriminatee] in reprisal for her espousing the [u]nion. . . ." *Id.* at 475.

22. *Radio Officers*, 347 U.S. at 23.

23. *Id.*

24. 347 U.S. 17 (1954). This case actually consists of three separate cases, each of which raised issues regarding the interpretation of §8(a)(3). In *Radio Officers' Union v. NLRB*, 196 F.2d 960 (2d Cir. 1952), *cert. granted*, 344 U.S. 852 (1952), and *NLRB v. Int'l Bhd. of Teamsters*, 196 F.2d 1 (8th Cir. 1952), *cert. granted*, 344 U.S. 853 (1952), two issues were raised: (1) must there be express proof that employer discrimination actually had the effect of discouraging union membership or is it sufficient to show that employer discrimination could reasonably have the tendency to discourage union membership and that such tendency can be inferred from the discriminatory act; and (2) is the phrase "membership in any labor organization" to be narrowly construed as covering only the acts of joining a union or remaining a member or should it be more broadly construed as including the obligations and activities attendant upon union membership. *Radio Officers* and *NLRB v. Gaynor News Co.*, 197 F.2d 719 (2d Cir. 1952), *cert. granted*, 345 U.S. 902 (1953), raised the issue of interest in the present discussion: whether a finding of intent to encourage or discourage union membership can be inferred from the discriminatory act itself.

25. Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Supporting Brief at 7, Radio Officers Union v. NLRB, 347 U.S. 17 (1954)(No. 5). As formulated by the employer in *Gaynor News*, the question was "[c]an an employer be held guilty of an unfair labor practice under Section 8(a)(3). . .where there is no evidence to indicate that the acts complained of encouraged or discouraged such membership, or that that was their purpose?" Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and Supporting Brief at 5, Gaynor News Co. v. NLRB, 347 U.S. 17 (1954)

In resolving this conflict, the Court reaffirmed the necessity for proving motive,[26] but held that evidence specifically directed to the issue of intent is not the sole method for proving that issue.[27] The Court sanctioned the use of the "common law rule that a man is held to intend the foreseeable consequences of his conduct", stating that:

> Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.[28]

The Court then described how this principle was applied to the employer's conduct in *Gaynor News v. NLRB*.[29] The initial contract between the union and the employer applied only to union members working in the delivery department.[30] The delivery department employed both union and nonunion workers. The nonunion workers were unable to join the union as the union admitted to membership only first-born legitimate sons of current members. When the contract expired, the parties executed an interim agreement providing that any wage increase negotiated in the new contract would be retroactively paid to the parties covered by the expired agreement. A new contract was subsequently executed which recognized the union as the exclusive representative for all delivery department employees and granted wage and benefit increases. The employer thereafter paid retroactive wage and vacation benefits to union members only. The employer argued that the discrimination in wage payment did not violate §8(a)(3) because it was only contractually bound to pay retroactive increases to the union members who had been covered by the previous agreement and it was merely making an economic business decision not to spend more than necessary.[31] The Court found that it was proper to apply the principle that the employer is held to

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(No. 7).

26. *Radio Officers*, 347 U.S. at 42-44. The Court remarked that "[t]he relevance of the motivation of the employer in such discrimination has been consistently recognized. . . ." *Id.* at 43.

27. *Id.* at 44-45.

28. *Id.* at 45.

29. *Id.* at 46-48 (discussing Gaynor News v NLRB, 347 U.S. 17 (1954)).

30. *Id.* at 36 n.33.

31. *Id.* at 36. The employer also argued it could not have intended to encourage the nonunion members to join the union because under union policies these employees were not eligible for membership. *Id.*; *see also* Gaynor News Co., 93 N.L.R.B. 299, 311-13 (1951).

intend the naturally foreseeable consequences of its acts. Discrimination based solely on union membership with respect to payment of wages was "inherently conducive to increased union membership."[32] It was obvious that employees, who saw that wages were tied to union membership, would be encouraged to join a union as to "obviate the need for any other proof of intent. . . ."[33]

Thus, where the employer's conduct on its face is based solely on union membership or activity, an inference may be drawn that the employer's motive in so acting is also based on union membership. In other words, conduct which is inherently discriminatory carries its own indicia of intent.

For example, where an employer discharges a union member claiming that the reason is absenteeism, the employer's act is not inherently discriminatory. The basis for the difference in treatment, on its face, is attendance. The employer's motive, as derived from the foreseeable consequences of its conduct, could be to encourage attendance at work rather than to discourage union membership. Thus, the employer's motive must be proved by specific evidence directed to this issue, (*e.g.* had the employer condoned the employee's absenteeism, or had other employees with similar absentee records not been discharged).[34] On the other hand, when the employer takes a work-related action (such as making retroactive wage payments), and the sole basis for determining which employees will be subject to that action is union membership, the conduct is inherently discriminatory. From the face of the employer's action it is handing out a benefit, or imposing a punishment, based on the union status of its employees. Such action will obviously cause employees to evaluate union membership in light of the benefit or punishment attached thereto, and it can be inferred that the employer intended that evaluation (i.e. encouragement or discouragement of union membership) to occur.

Justice Frankfurter's concurrence in *Radio Officers* was directed primarily at clarifying the role which an employer's inherently discriminatory conduct plays in establishing motive.[35] He made

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32. *Radio Officers*, 347 U.S. at 46.

33. *Id.* As for the claim that the conduct could not have encouraged employees to join the union because they were ineligible for membership, the Court determined that actual encouragement need not be shown so long as it is reasonable to infer that the conduct in question has a tendency to encourage union membership. *Id.* at 48.

34. *See supra* notes 17-21 and accompanying text (discussing cases that developed indirect evidence from which a trier of fact could infer an employer's motive).

35. *Radio Officers*, 347 U.S. at 55-57 (Frankfurter, J., concurring).

it clear that such conduct raises an inference only,[36] which may or may not be drawn based on other evidence presented in the case. In some cases, the defense proffered by the employer to justify its inherently discriminatory conduct may be sufficiently compelling as to undermine the reasonableness of drawing an inference that the employer's motive was an illegal one.[37] Under such circumstances, if the Board were to draw an inference of illegal motive, a reviewing court should overturn the finding as not being supported by substantial evidence when viewing the record as a whole.[38] In other cases, the inference drawn from the employer's inherently discriminatory conduct would be sufficient, by itself, to support a finding of illegal motive.[39]

The Board attempted to apply the common law foreseeability rule sanctioned by *Radio Officers* to situations involving exclusive hiring halls.[40] In *Mountain Pacific Chapter of the Associated Gen-*

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36. An inference is to be distinguished from a presumption. A fact or series of facts from which a trier of fact *may* draw a certain conclusion creates an inference; when the trier of fact *must* draw the conclusion, a presumption is created. BLACK'S LAW DICTIONARY 778, 1185 (5th ed. 1979).

37. *Radio Officers*, 347 U.S. at 55-57.

38. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951)(setting forth the standard of review for courts of appeal in Board decisions).

39. *Radio Officers*, 347 U.S. at 56-57 (Frankfurter, J., concurring). Justice Frankfurter explained that:

> In many cases a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling that a further and separate finding characterizing the employer's state of mind would be an unnecessary and fictive formality. In such a case the employer may fairly be judged by his acts and the inferences to be drawn from them.
>
> Of course, there will be cases in which the circumstances under which the employer acted serve to rebut any inference that might be drawn from his acts of alleged discrimination standing alone. For example, concededly a raise given only to union members is prima facie suspect; but the employer, by introducing other facts, may be able to show that the raise was so patently referable to other considerations, unrelated to his views on unions and within his allowable freedom of action, that the Board could not reasonably have concluded that his conduct would encourage or discourage union membership.
>
> In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration. The Board's task is to weigh everything before it, including those inferences which, with its specialized experience, it believes can fairly be drawn. On the basis of this process, it must determine whether the alleged discriminatory acts of the employer were such that he should have reasonably anticipated that they would encourage or discourage union membership.

Id.

40. An exclusive hiring hall is an arrangement between an employer and a union requir-

eral Contractors, Inc.,[41] the Board found that the practical effect of giving the union control over employment referrals was to encourage individuals seeking employment to be subservient to the union, either by becoming members or participating in union activities.[42] Citing to *Radio Officers*, the Board found that exclusive hiring halls inherently encourage union membership, thus allowing the Board to draw the inference that the employer intended the foreseeable consequences of this arrangement.[43]

The Supreme Court had the opportunity to review the Board's analysis and application of *Radio Officers* in exclusive hiring hall situations in *Local 357, International Brotherhood. of Teamsters v. NLRB*.[44] The flaw in the Board's analysis was the lack of a finding that the employer's conduct was inherently discriminatory, such a finding being the necessary prerequisite to application of the inherently discriminatory doctrine. In the exclusive hiring hall situation presented in *Local 357*, the arrangement specifically provided that individuals would be referred by the union regardless of whether or not they were union members.[45]

The Act does not prohibit encouragement or discouragement of union activity *per se*.[46] The fact that certain employer conduct may encourage individuals to join a union is not sufficient to find a violation of §8(a)(3). When, as a result of collective bargaining with a union, the employer grants the employees in the bargaining unit a raise, it is likely that some of these employees will be encouraged to participate in the union as a result of receiving this benefit.[47] But encouragement alone is not unlawful; only that which is accomplished by discrimination is illegal.[48] When the employer decides to give the negotiated wage increase only to employees who are union

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ing the employer to consider and hire only those applicants referred by the union; it prohibits the employer from accepting applicants from any other source. *See* Fick, *Political Abuse of Hiring Halls: Comparative Treatment Under the NLRA and the LMRDA*, 9 INDUS. REL. L.J. 339, 344 (1987).

41. 119 N.L.R.B. 883, 895 (1957).

42. *Id.* at 895.

43. *Id.* at 895.

44. 365 U.S. 667 (1961). This case did not directly review the *Mountain Pacific* case. The underlying case on review was *Los Angeles-Seattle Motor Express, Inc.*, 121 N.L.R.B. 1629 (1958), *enforced in part*, 275 F.2d 646 (D.C. Cir. 1960) involving a finding that an exclusive hiring hall violated §8(a)(3) of the NLRA based on the rationale enunciated in *Mountain Pacific*.

45. Local 357, Teamsters, 365 at 668.

46. *Id.* at 674-75 (quoting *Radio Officers*, 347 U.S. at 42-43).

47. *Id.* at 675.

48. *Id.* at 676.

members, then both discrimination and encouragement are present and the employer's conduct is illegal. Thus, even though the existence of the exclusive hiring hall encourages union membership, the lack of any evidence of discriminatory conduct negates a finding of a §8(a)(3) violation.[49]

Local 357 emphasized that the conduct in question must be inherently discriminatory before the common law foreseeability rule is applied.[50] On its face the conduct must distinguish between those who are union members and those who are not, or between those who participate in certain union activities and those who do not. Having shown that the conduct in question is inherently discriminatory and that such conduct has the practical foreseeable effect of encouraging or discouraging union membership, *then* the inference may be drawn that the employer's motive in engaging in the conduct was for the purpose of such encouragement or discouragement and a violation of §8(a)(3) may be found. Merely showing that employer conduct tends to encourage union membership without a showing that such conduct is inherently discriminatory will not support an application of the inherently discriminatory doctrine.

The Board next attempted to apply the inherently discriminatory doctrine in *Erie Resistor Corp.*,[51] a case involving an employer grant of superseniority to nonstrikers; this time it was successful.[52] The facts of the *Erie Resistor* case, as found by the administrative law judge, are as follows:

When the union and employer were unable to reach an agreement upon expiration of their old contract, the union went on strike.[53] The employer attempted to maintain production by using non-unit employees, but was only able to attain 20-30% of its pre-strike production levels.[54] This was inadequate to meet customer demand, so the employer began hiring replacement workers. Although the employer gave the replacements assurances that they would not be laid off or discharged when the strike ended, it was unable to secure sufficient workers to meet production demands. The employer, therefore, devised a twenty year superseniority plan[55] in order to at-

49. *Id.* at 674-76.

50. *See id* at 675.

51. 132 N.L.R.B. 621 (1961), *enforcement denied sub nom*, International Union of Elec. Workers, Local 613 v. NLRB, 303 F.2d 359 (3d Cir. 1962), *rev'd*, 373 U.S. 221 (1963).

52. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

53. 132 N.L.R.B. at 639.

54. *Id.*

55. The twenty year number was calculated as the amount of seniority necessary to insure that replacement workers would not be laid off in future business recessions. *Id.* at 627

tract replacement workers. Within ten days of the posting of the plan, the strike collapsed and those strikers who had not been replaced were reinstated. Subsequently, when layoffs became necessary, reinstated strikers, who otherwise would have been retained, were laid off due to the operation of the superseniority plan. The union challenged the plan as violative of §8(a)(1), (3) and (5) of the Act.[56]

The administrative law judge held that motive was the central issue in determining the legality of the employer's conduct, and that the General Counsel had failed to prove an illegal motive.[57] Indeed, the facts showed that the employer adopted the plan for legitimate, economic reasons.[58] The employer did not immediately replace the strikers, but did so only after its attempts to maintain production with non-unit employees proved unavailing. Its initial attempts to secure replacements did not include an offer of superseniority; it was only when it became evident that assurance of permanent status was not sufficient to enlist replacements that it devised the superseniority plan. Toward the end of the strike, the employer had enough applications to replace all the strikers but it refrained from doing so because it did not want to break the union.[59]

While the Board agreed with the administrative law judge's factual findings,[60] it disagreed with his legal conclusions and found a violation of §8(a)(3).[61] Citing to *Radio Officers*, the Board held that the employer's conduct in this case spoke for itself and obviated any necessity for specific proof that the employer intended to discourage union membership.[62] Specifically, the Board stated that:

> Respondent's superseniority policy - on its face discriminatory against those who continued to strike - clearly discouraged strike activities and union membership of employees. Such was the inevitable result of a preference granted for all time to those who did not join the Union's strike activities. Where discrimination is so patent, and its consequences so inescapable and demonstrable, we do not think the General Counsel need prove that Respondent sub-

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n. 20. It was based on a projection of the number of employees on layoff and future business needs. Superseniority could be used only for layoff purposes, not for other types of employment benefits. *Id.* at 622-23.

56. *Id.* at 638.
57. *Id* at 645-46.
58. *Id.* at 647.
59. *Id.* at 645-47.
60. *Id.* at 621.
61. *Id.* at 630-31.
62. *Id.* at 629-30.

jectively "intended" such a result.[63]

The Board did not ignore the defense proffered by the employer in seeking to justify its conduct.[64] As noted by Frankfurter in his concurrence in *Radio Officers*, such evidence may be sufficient to overcome the inference of illegal motive to be drawn from the inherently discriminatory conduct and its foreseeable consequences.[65] The Board found, however, that with the type of conduct and its attendant consequences present in this case, the employer could not justify its acts even if motivated by business necessity. "To excuse such conduct would greatly diminish, *if not destroy*, the right to strike guaranteed by the Act, and would run directly counter to the guarantees of Section 8(a)(1) and (3) that employees shall not be discriminated against for engaging in protected concerted activities."[66] The Board suggested that there are some types of inherently discriminatory conduct whose effects are so pernicious that the employer can be found to have intended those effects even in the face of evidence that its motive was a legitimate one. This analysis would seem to run counter to the implication derived from Frankfurter's concurrence that a Board finding of illegal motive inferred from inherently discriminatory conduct should be overturned where the employer provides sufficiently compelling evidence of legal motivation.[67]

It was on this basis that the Third Circuit refused to enforce the Board's finding of an 8(a)(3) violation.[68] The court reviewed the holding in both *Radio Officers* and *Local 357* and found that these cases did not make the issue of motive irrelevant.[69] It interpreted *Radio Officers* as holding that "evidentiary facts, *absent proof of a valid business reason*, were sufficient to support an inference that the disparate treatment of the employees was intended to encourage union membership."[70] The court also cited to the rationale of *Mackay Radio*[71] as supporting its conclusion.[72] The court interpreted the

63. *Id.* at 630.

64. *Id.*

65. *See supra* notes 48-52 (reprinting Frankfurter's concurrence).

66. *Erie Resistor*, 132 N.L.R.B. at 630. (emphasis added). Thus, the Board found it unnecessary to decide whether or not the employer actually was motivated by business considerations. *See id.* at 630 n.30.

67. *See supra* notes 35-39 and accompanying text (discussing Frankfurter's concurrence).

68. *See* International Union of Elec. Workers, Local 613 v. NLRB (Erie Resistor), 303 F.2d 359, 364 (3d Cir. 1962).

69. *Id.* at 362-63.

70. *Id.* at 363.

71. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). *Mackay Radio* is a classic example of obiter dicta becoming the law of the case. The facts are relatively simple.

facts of *Mackay* - permanent replacement of strikers - as presenting inherently discriminatory conduct which may tend to discourage union membership.[73] The court read *Mackay* as sanctioning such conduct, however, because the employer's motive was to protect and continue his business.[74] Thus, the Third Circuit concluded, the employer's motive is always relevant even in an inherently discriminatory case.[75]

The Supreme Court reversed the Court of Appeals, finding that it had erred in holding that "a legitimate business purpose is always a defense to an unfair labor practice charge."[76] The Court cited to *Radio Officers* and *Local 357* for its holding that evidence directed specifically at intent is not always necessary, but that intent may

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The union engaged in an economic strike against the employer, who hired some replacement workers. When the strike ended, five replacement workers remained employed. In deciding which strikers to reinstate to the vacant positions, the employer chose not to reinstate the individuals who had been strike leaders. The Board assumed, *arguendo*, that the employer could retain replacement workers and the only issue it had to decide was whether the employer violated §8(a)(3) by the method it used to determine which strikers were eligible for reinstatement. It found that the employer used union leadership as its criteria, thereby violating §8(a)(3) and ordered the employer to reinstate the strike leaders. *Mackay Radio*, 1 N.L.R.B. 201, 216-17 (1936). The Ninth Circuit refused to enforce the Board's order, with one judge disagreeing with the Board's conclusion that the refusal to reinstate was based on union leadership criteria, and the other judge finding that the individuals in question were not employees at the time reinstatement was at issue because by participating in the strike they had quit. *Mackay Radio*, 87 F.2d 611, 628, 631 (9th Cir. 1937). Thus, the issues to be decided by the Supreme Court were whether the strikers were employees and whether the employer discriminated in reinstatement based on union activities. *See* 304 U.S. at 342-43. It answered both of these questions affirmatively. *Id.* at 345-47. At the same time, it stated its opinion on the issue which the Board expressly found was not necessary to decide, i.e., the legality of permanently replacing economic strikers-the Court's opinion being that it was not illegal. *Id.* at 344-46. It is this latter aspect of the case that has come to be known as the *Mackay* doctrine.

72. *International Union of Elec. Workers*, 303 F.2d at 363-64.

73. The court did not explicate how it found permanent replacement to be inherently discriminatory. The Board's position on the issue is that it is not. The employer has an available job and is willing to employ any individual who will do the work; the striker will not do the work, and therefore, the employer hires someone else. When the strike is over, the employer refuses reinstatement to the striker not because he is a striker but because there are no available jobs. Brief for the National Labor Relations Board at 36-37, Erie Resistor Corp. v. NLRB, 373 U.S. 221 (1963) (No. 288).

74. *International Union of Elec. Workers*, 303 F.2d at 363-64. Not only was the Court's "sanctioning" contained in obiter dicta, but the case itself predates *Radio Officers* use of common law foreseeability and the inherently discriminatory doctrine by sixteen years. Indeed, the Supreme Court implied, in its decision in *Erie Resistor* wherein it rejected the Court of Appeals' reliance on *Mackay* in reaching its decision, that were *Mackay* to be decided at this point in time the result might be different. "We have no intention of questioning the continuing vitality of the Mackay rule, but we are not prepared to extend it to the situation we have here." *Erie Resistor*, 373 U.S. at 232.

75. *Int'l Union of Elec. Workers* 303 F.2d at 363-64.

76. *Erie Resistor*, 373 U.S. at 227.

sometimes be inferred from the foreseeable consequences of the employer's conduct. The Court noted that illegal intent may be inferred from the "inherently discriminatory *or destructive* nature of the conduct itself."[77] In such circumstances, the employer may claim that its dominant motive is not to discourage union membership but to accomplish legitimate business interests. However, the Court noted that:

> [n]evertheless, his conduct *does* speak for itself - it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task. . .of weighing the interests of the employees in concerted activity against the interest of the employer in operating his business. . .and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[78]

Thus, the *Erie Resistor* case added two new elements to the development of the inherently discriminatory doctrine. First, the foreseeable consequences of some types of inherently discriminatory conduct are so destructive of the right to engage in union activities, that even if the employer produces evidence that it was motivated by legitimate business considerations, the Board may still find that the employer also intended to discourage union activities. Second, in determining which of these two motives is dominant, the Board is required to engage in a balancing act - does the employer's business interest outweigh the harm done to employee rights.

Applying this theory to the facts of *Erie Resistor*, the Court found that the superseniority plan was both inherently discriminatory and inherently destructive.[79] The benefit of superseniority was doled out based solely on the criteria of who was willing to refrain from engaging in the strike (either by crossing the picket line or abandoning the strike) and who was committed to participation in the strike for the duration.[80] The effects of the grant of this benefit on the employees' right to engage in union activities were both long-lasting and pernicious. Even after the strike ends, there would be a

77. *Id.* at 228 (emphasis added).
78. *Id.* at 228-29 (footnotes omitted).
79. *Id.* at 231.
80. *Id.* at 230-31.

permanent distinction made in the treatment of strikers and non-strikers: whenever a layoff is necessitated, the order of layoff for the employees would be determined by the application of superseniority. This permanent distinction rendered future bargaining by the union extremely difficult, both in terms of its ability to muster support for future strikes[81] and its ability to fairly represent the interests of its constituency in negotiations.[82]

The Court found that extending this benefit also "deals a crippling blow to the strike effort."[83] By abandoning the strike, or crossing the picket line, an employee could gain in one day a benefit which he otherwise would have to work 20 years to attain. Moreover, since the advantages to be gained by seniority are relative to the seniority possessed by others, those employees who remained on strike suffered a loss when strike-breakers received this benefit. "This combination of threat and promise could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy."[84]

The Court next turned its attention to the balancing of interests.[85] Having found the superseniority plan to be both inherently discriminatory and destructive, the Court had to consider whether the employer's proffered business justification was sufficient to outweigh the destructive impact of the conduct. Initially, the Court noted that the *Mackay* doctrine[86] allowing for the permanent replacement of economic strikers does not logically support a conclu-

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81. *Id.* at 230-31. The bargaining leverage to be derived from a viable strike threat is lost. The threat/promise effect of superseniority acts as a powerful deterrent to employee support of a strike.

82. *Id.* at 231. In formulating substantive proposals, the union will be caught on the horns of a dilemma. One group of workers will press the union to negotiate away superseniority while the other group will want the benefit maintained and even extended. The basis for this conflict of interest will not be the normal disagreement over the relative advantage of certain benefits, e.g. whether more money should go for wages or pension improvements. Rather, the disagreement will be based on who participated in union activities and who did not. Attempting to reconcile the latter type of conflict almost inevitably places the union in a breach of duty of fair representation.

Unions are allowed a wide range of reasonableness in choosing among the competing interests of the employees they represent. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). so long as those choices are not based on arbitrary, discriminatory or bad faith considerations. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204 (1944). If a union choice in a conflict situation is based on union activity considerations, such choice would be discriminatory and a breach of the duty of fair representation. *See* Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 199 (4th Cir. 1963).

83. 373 U.S. at 230.

84. *Id.* at 230-31.

85. *Id.* at 231-32.

86. *See supra* notes 71-74 (discussing the *Mackay* doctrine).

sion that the grant of superseniority to such replacements is also allowed. The Court found that superseniority represented a far greater encroachment on employee rights.[87]

Numerous sections of the NLRA evidence a "solicitude for the right to strike" and the policy of the Act recognizes the strike as a means for "implement[ing] and support[ing] the principles of the collective bargaining system."[88] Thus, the Court held that "in view of the deference paid the strike weapon" under the Act and the inherently discriminatory and destructive nature of the superseniority policy, the Board had properly concluded that the employer's business justification did not outweigh the harm inflicted on employee rights.[89]

The Board was soon confronted with an occasion for applying the new elements added by *Erie Resistor* which had expanded the inherently discriminatory doctrine - inherently destructive conduct and the balancing of interests.[90] In *Brown Food Store*,[91] the employer was a member of a multi-employer bargaining association. When the union and the association were unable to reach agreement on a new contract, the union struck and picketed one of the association members, Food Jet. The other employer-members responded by locking out their bargaining unit employees. All the association members, however, continued to operate their stores - Food Jet by hiring replacement employees for the striking workers and the other employer-members by utilizing their non-unit employees and by hiring temporary replacement workers for the locked out unit employees. The union alleged that the use of replacement workers for the locked out employees violated §8(a)(3).[92]

The Board noted initially that the lockout alone, employed by the association members in response to the union's strike against Food Jet, was privileged, pursuant to the *Buffalo Linen Supply Co.*, case, as a defensive measure by the employer to preserve the integrity of the multi-employer group.[93] But the further step of maintain-

87. 373 U.S. at 232.

88. *Id.* at 233-34 (footnote omitted).

89. *Id.* at 235-37.

90. Brown Food Store, 137 N.L.R.B. at 73, 73-74 (1962).

91. 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 278 (1965).

92. *Brown Food*, 137 N.L.R.B. at 73-74.

93. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), *rev'd sub nom*, Truck Drivers Local Union No. 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957). This case is not directly part of the inherently discriminatory line of cases. It followed *Radio Officers* but preceded the remainder of the inherently discriminatory cases and neither the Board, nor the courts, relied on or cited to *Radio Officers* in reaching their decisions.

ing operations by hiring replacements for the locked out workers exceeded the measures necessary to preserve the integrity of the group.[94]

The Board determined that the employers' conduct in hiring temporary replacements was inherently discriminatory.[95] The employers had work available and their own employees were willing to perform the work but the employer gave the work to the replacements solely on the basis that their own employees were members of a union which had engaged in a strike against Food Jet.[96] The additional impact of temporary replacement with the lockout was inherently destructive of the employees' right to join the union.[97] The Board held that even if the employers' intent in hiring replacements was economic self-interest, rather than to discourage union membership, it was not sufficient to negate the foreseeable effect of such

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In *Buffalo Linen*, the Board engaged in a balancing of interests between the right of the union to engage in a strike versus the right of the employer to protect the integrity of a multi-employer bargaining unit. *See* 353 U.S. at 97. The Board found that a union strike against a single member of a multi-employer bargaining group carries with it the implicit threat of future strikes against other members, with the aim of atomizing employer solidarity within the group. "The calculated purpose of maintaining a strike against one employer and threatening to strike others in the employer group at future times is to cause successive and individual employer capitulations." 109 N.L.R.B. at 448. Thus, the employer's defensive response in locking out its employees was privileged. *Id.*

It should be noted that the right being weighed on the employer's side which was found sufficient to justify the harm imposed on the right to strike was not merely the employer's economic interest in running its business. Rather, the employer was protecting its interest in maintaining the viability of the multi-employer bargaining group, which interest the Court found was consistent with the federal labor policy of "promoting labor peace through strengthened collective bargaining." 353 U.S. at 95.

94. A multi-employer bargaining group is composed of employers, engaged in the same industry in a defined geographic area, whose employees are all represented by the same union. Thus, if only one employer-member is closed down due to a strike and the others remain open, the employer loses its customers to its rivals, perhaps permanently. To avoid this loss, the struck employer is pressured to capitulate to the union's demands so that it can reopen. Having successfully achieved its objective with the first employer, the union now strikes the next employer-member until it capitulates to the competitive pressures. By knocking off the employers one-by-one, the union can break up the group. In order to avoid this result, *Buffalo Linen* allows all the employer-members to lock out the union employees if one employer-member is closed down during a strike. This prevents the nonstruck employers from gaining a competitive advantage over the struck employer. But, if the struck employer continues to operate during the strike, then there is no reason for the other members to shut down. The struck employer is not at a competitive disadvantage - it continues to serve its customers. *Brown Food*, 137 N.L.R.B. at 76.

95. *Id.*

96. *See id.* at 75-76; Brief for the National Labor Relations Board at 11-12, 17, NLRB v. Brown, 380 U.S. 278 (1965) (No. 7).

97. *See* Brief for the National Labor Relations Board at 10 n.2, NLRB v. Brown, 380 U.S. 278 (1965) (No. 7).

replacement to discourage union membership.[98] In determining which of these two motives was dominant - the intent to discourage union membership inferred from the conduct or the employers' economic self-interest - the Board determined that the employers' interest did not outweigh the harm to employee rights.[99]

The Supreme Court disagreed with the Board's characterization of the employers' conduct as inherently destructive.[100] The Court noted that, in the absence of proof relating to unlawful motive, employers have been allowed to employ economic weapons whose effects discourage union membership, such as defensive lockouts and permanent replacement of economic strikers. The Court failed to see how the use of temporary replacements was any more destructive of employee rights than the lockout itself, which was concededly lawful under *Buffalo Linen.*[101] The Court was not willing to find that the effect on employee rights from the use of the replacements exceeded the effect from the lockout alone, merely because the employers' regular employees were willing to work. The Court appeared to premise this conclusion on the fact that the employees' willingness to work was motivated more by their desire to see the union's whipsaw strike succeed than by a desire to work under the employers' terms.[102] There was no discussion as to why the employees' motive should be relevant to the issue of whether the employers' conduct has inherently destructive effects.[103]

The Court in *Brown Food* did not eschew *Radio Officers* and its progeny. It used *Erie Resistor* as an example where an employer's action "was discriminatory conduct that carried its own indicia of improper intent" and that the effect of that conduct was so "inherently destructive of employee interests [it] could not be saved from illegality by an asserted overriding business purpose pursued in good

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98. *Brown Food*, 137 N.L.R.B. at 75.

99. *Id.*

100. *Brown Food*, 380 U.S. at 282-83.

101. *Id.* at 283-84.

102. *Id.* at 284-85.

103. Justice White, in his dissent, failed to see the connection between employee motives and the effects of employer conduct.

> [A]n employer may not displace union members with nonunion members solely on account of union membership. . .and may not maintain operations and refuse to retain or hire nonstriking union members, notwithstanding that most of the union members and most of the workers at that very plant are on strike. . . . The employees are not on strike, and desire to work, *for whatever reasons*, and nothing in the right to lock out can alter these facts.

Id. at 297 (emphasis added).

faith."[104] The Court noted, however, that the analysis differs when inherently discriminatory conduct is not inherently destructive. When "the tendency to discourage union membership is comparatively slight, and the employers' conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where improper motivation of the employers must be established by independent evidence."[105]

The Court disagreed with the Board's determination that the employers' action was inherently destructive; rather it found the effect on employee rights was only comparatively slight.[106] The Court determined that the additional discouragement of union membership attributable to the use of temporary replacements was comparatively insubstantial on three grounds. First, since the replacements were only temporary, the employees could not reasonably view the employers' conduct as threatening their jobs.[107] This conclusion failed to take into account that the use of replacements did threaten the workers' livelihood in the short-term. They were unable to earn wages because the replacements were doing their work - a loss of earnings which the employees would never regain.

Second, the Court noted that the employees could end the lockout by agreeing to the employers' contract terms.[108] The Court did not explain why it should be relevant to the issue of the impact of the employers' conduct on employee rights that the employees have the ability to make the employer cease its conduct.[109] That employees can get an employer to stop discouraging them from union membership does not mean that an employer was not so discouraging them.

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104. *Id.* at 287.

105. *Id.* at 287-88.

106. *Id.* at 288. Justice White, in dissent, agreed with the Board's appraisal in this regard, finding it "far more consistent with *Erie Resistor* and industrial realities." *Id.* at 298.

107. *Id.* at 288.

108. *Id.* at 289.

109. An employer's threat to lower the wage rate if the employees vote in a union is within the employees' control. If they vote against the union the employer will not lower their wages. This does not mitigate the coercive impact of the employer's conduct. An employer is allowed to attempt to influence employee opinion regarding the merits of union representation, but cannot use interference, restraint or coercion as methods of influence. 29 U.S.C. § 158(a)(1) § (c) (1982). That the threat is within the employees' ability to defuse does not make it any less coercive. Likewise, an employer is allowed to attempt to persuade the employees to accept its proposed contract terms; this is the essence of collective bargaining. Some methods of persuasion however, such as those which discourage union membership, are beyond the allowable limits of the law. *See* Brown Co., 243 N.L.R.B. 769 (1979), *enforcement denied and remanded on other grounds*, 663 F.2d 1078. (9th Cir. 1981), *modified*, 278 N.L.R.B. 783 (1986), *enforced*, 833 F.2d 1015 (9th Cir. 1987).

Thirdly, the Court found that since the new contract contained a union security provision, the employees would have little to gain in quitting the union.[110] The *Radio Officers* case suggests that this consideration is irrelevant in determining the effect of an employer's conduct on employee rights.[111] In *Radio Officers* the employer argued that paying retroactive wage increases only to union members could not have encouraged employees to join the union because the union's own membership policy prevented the employees from joining.[112] The Court in *Radio Officers* held that evidence that employees were in fact encouraged to join the union was not required; rather it was sufficient if the employer's conduct could be said to reasonably tend to encourage membership.[113] Thus, the existence of the union security clause in *Brown Food* which may act to keep employees from quitting the union does not mean that the employers' conduct could not be said to reasonably tend to discourage membership.

Having found the effect of the employer's conduct in *Brown Food* comparatively slight, the Court also found the employers' conduct was "adapted to the achievement of a legitimate end - preserving the integrity of the multi-employer bargaining unit."[114] The Court, however, did not address the Board's argument that hiring replacements was not necessary to preserve the unit - it went beyond the measures necessary to achieve that goal.[115] Indeed, the Court itself, only a page earlier, had talked about employer conduct "*reasonably adapted* to achieve legitimate business ends. . . ."[116]

A companion case, decided the same day as *Brown Food*, also involved a lockout situation. In *American Ship Building Co.*,[117] after extended negotiations which left major issues unresolved, the parties reached an impasse. Thereafter, the employer locked out the employees in order to bring economic pressure on them to accept its contract terms.[118] The Board had held that, absent special circum-

110. *Brown Food*, 380 U.S. at 289.
111. *Radio Officers*, 347 U.S. at 52.
112. *Id.* at 36.
113. *Id.* at 50-51.
114. *Brown Food*, 380 U.S. at 289.
115. *See supra* note 94. (discussing multi-employer units and the Board's holding in *Brown Food*); *see also Brown Food*, 380 U.S. at 296 (White, J., dissenting). *See infra* notes 256-68 and accompanying text, discussing the necessity for narrowly tailoring conduct to achieve the proffered justification).
116. *Brown Food*, 380 U.S. at 288 (emphasis added).
117. American Ship Building Co., 142 N.L.R.B. 1362 (1963), *enforced per curiam*, 331 F.2d 839 (D.C. Cir. 1964), *rev'd*, 380 U.S. 300 (1965).
118. *Id.* at 303-305.

stances,[119] an employer cannot lock out its employees in aid of its bargaining position.[120]

This holding, based on a long line of Board lockout cases,[121] was premised on the finding that an employer lockout constitutes inherently discriminatory conduct which carries its own indicia of intent. The discrimination was between how the employer would have treated its employees if they were not represented by a union bargaining agent, i.e., no lockout, and how it treated its employees because they were so represented. "Respondent laid off its employees because they were engaged in lawful collective bargaining through their statutory representatives; it follows also that the reasonably foreseeable consequences of the Respondent's conduct were such as would normally infringe employee rights guaranteed by Section 7 of the Act. . . ."[122]

Having found the lockout to be inherently discriminatory, the Board considered whether the employer's justification was sufficient to overcome the inference of illegal motive. It held that an employer's fear of loss of customers or future business in the event of a strike did not justify the interference with employee rights caused by the lockout.[123] The balance struck was based on the fact that the Act specifically guarantees the right to strike as a weapon available to the employees as a means of securing better working conditions. A corollary effect of this right, and a measure of its effectiveness, is the economic disruption caused to the employer's business. The Board concluded that the right to strike would be a hollow one if the employer were allowed to engage in anticipatory conduct and immunize itself from the effects of the strike.[124]

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119. *See* Building Contractors Ass'n of Rockford, Inc., 138 N.L.R.B. 1405 (1962) (permitting lockout where public safety and welfare endangered); Betts Cadillac-Olds, Inc., 96 N.L.R.B. 268 (1951) (lockout allowed to protect the property of customers if strike is imminent); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (permitting lockout to prevent waste or spoilage of perishable inventories); *see also American Ship*, 380 U.S. at 307 (listing cases where Board permitted lockouts).

120. *American Ship*, 142 N.L.R.B. at 1364.

121. *See* Quaker State Oil Refining Corp., 121 N.L.R.B. 334 (1958), enf'd 270 F.2d 40 (3rd Cir. 1959), *cert. denied*, 361 U.S. 917 (1959); American Brake Shoe Co., 116 N.L.R.B. 820 (1956), *vacated*, 224 F.2d 489 (7th Cir. 1957); Morand Bros. Beverage Co., 99 N.L.R.B. 1448 (1952), *enf'd* 204 F.2d 529 (7th Cir. 1953).

122. *American Brake*, 116 N.L.R.B. at 826 (involving an employer lockout for the purpose of bringing pressure on the union to agree to the employer's proposals); *see also* Brief for the National Labor Relations Board at 11-12, 14-15 & n.11, *American Ship*, 380 U.S. 300 (1965) (No. 255); *see infra* text accompanying notes 172-80 (discussing sequential discrimination).

123. *American Brake*, 116 N.L.R.B. at 832.

124. *Id.*

The Supreme Court disagreed with both the Board's conclusion that the conduct was inherently discriminatory as well as the results of its balancing of interests. The Court found it "difficult to understand" how the employer was discriminating against union members.[125] It noted that the employer had not locked out *only* union members nor had it conditioned recall upon resignation from the union. The Court did admit that the employees were suffering a disadvantage because of the union's bargaining demands (the basis for the Board's finding of discrimination).[126]

The Court followed this observation with a non sequitur; it shifted the discussion from whether the employer's conduct was inherently discriminatory to a consideration of other types of employer conduct which create economic disadvantage and yet are not unlawful, citing as examples *Mackay*, *Tex-Tan*, and an employer's refusal to make a concession in bargaining.[127] Justice White, in his concurrence, also had trouble with the Court's analysis on this point. "I would have thought it apparent that loss of jobs for an indefinite period. . .because of the union's negotiating activity, itself protected under §7, hardly encourage[s] affiliation with a union."[128]

Having found no inherently discriminatory conduct, the Court noted that there was no independent evidence that the employer was actually motivated by a desire to discourage union membership, but

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125. *American Ship*, 380 U.S. at 312-13. *But see infra* notes 183-93 and accompanying text (discussing the concept of sequential discrimination).

126. *American Ship*, 380 U.S. at 312; *see supra* notes 121-23 and accompanying text.

127. *American Ship*, 380 U.S. at 312-13. Moreover, the cited examples are clearly distinguishable from the employer conduct in the present case. As previously discussed, the permanent replacement of strikers allowed by *Mackay* is arguably not inherently discriminatory and therefore the fact that the disadvantage it creates is not illegal does not determine whether a lockout is inherently discriminatory. *See supra* note 73. Even if one considers *Mackay* to involve inherently discriminatory conduct, the disadvantage it produced is not illegal because the employer's interest outweighs the disadvantage produced. This latter conclusion is the result of a balancing of interest, and is not helpful in determining the initial issue of whether certain conduct is inherently discriminatory.

In *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963), the court sanctioned the unilateral imposition of contract terms premised on two specific statutory grounds: §8(d) explicitly states that the duty to bargain does not require agreeing to the other side's terms, and imposition is allowed only after the employer has exhausted its statutory duty to bargain and impasse is reached. *Id.* at 482-83. It is also questionable whether unilateral imposition constitutes inherently discriminatory conduct - in the absence of a union the employer would have imposed its own terms on the employees. The issue was not raised in *Tex-Tan*, however, as it was decided under §8(a)(5). Lastly, an employer's refusal to make a concession is explicitly sanctioned by the Act in §8(d) and cannot be considered inherently discriminatory.

128. *American Ship*, 380 U.S. at 324 (White, J., concurring). White concurred only with the result of the case, not with its reasoning. *Id.* at 318. He found no unfair labor practice because, on the facts, he determined that the lockout was caused by lack of work *not* by the employer's desire to pressure the employees to accept its bargaining proposals. *Id.* at 322.

rather the evidence showed its intention was merely to obtain favorable contract terms.[129] Therefore, there was no violation of §8(a)(3).[130]

The Court also found that the Board, by engaging in a balancing of interest, had exceeded its authority.[131] Since there was no inherently discriminatory conduct nor any independent evidence of illegal motive, there was no occasion for an assessment of the employer's motive as measured against the harm to employee rights. By balancing interests in this case, the Board in essence was acting as an "arbiter of the sort of economic weapons the parties can use" in bargaining and deciding the lockout was unfair because it gave the employer too much power.[132] The Board, however, does not possess the authority to make this type of policy decision which is a legislative, not judicial, function.[133]

These lockout cases do not represent a change in the inherently discriminatory doctrine, but rather a disagreement over the application of the doctrine to specific facts. The next Supreme Court case to deal with this issue specifically reaffirmed the doctrine as developed from *Radio Officers* through *Erie Resistor*.

Great Dane Trailers[134] involved an employer's refusal to pay accrued vacation benefits to strikers while paying such benefits to nonstrikers, replacements and cross-overs.[135] The Court, in finding the employer's conduct violative of §8(a)(3),[136] summarized the inherently discriminatory doctrine:

> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the

129. *Id.* at 313.
130. *Id.*
131. *Id.* at 316.
132. *Id.* at 317 (citing NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960)).
133. *American Ship*, 380 U.S. at 318.
134. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).
135. *Id.* at 27-30.
136. On its face, the Court found that the employer's conduct was inherently discriminatory. *Id.* at 32. The determination as to who would receive accrued vacation benefits was based on whether or not an employee had engaged in protected strike activity. Likewise, there was no doubt that paying benefits based on protected strike activity has the foreseeable effect of discouraging employees from engaging in such activity. Since the employer produced no evidence of legitimate motive, it was found to have violated §8(a)(3). *Id.* at 32-34.

> adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[137]

In *Fleetwood Trailer*,[138] the employer refused to reinstate striking employees at the termination of the strike because no job vacancies existed at that time, since the employer hired permanent replacements during the strike. Subsequently, when job openings occurred, the employer hired new employees rather than reinstating the strikers. The Board held that the employer discriminated against the strikers by hiring new workers rather than reinstating the strikers, thereby violating §8(a)(3).[139] The Ninth Circuit refused to enforce the Board's order, holding that on the date the strikers applied for reinstatement, there were no jobs available, and there was no proof that the employer's subsequent decision to hire new employees was motivated by antiunion considerations.[140]

The Supreme Court found that the effect of refusing to reinstate strikers was to discourage employees from exercising their right to strike, and that unless the employer can show legitimate and substantial business justification for such refusal, it is guilty of violating §8(a)(3).[141] The Court analogized the instant case to *Great Dane*, stating that the refusal to reinstate strikers is no less destructive of employee rights than the refusal to pay accrued vacation benefits, and since the employer has failed to show any justification for its conduct, it violated §8(a)(3).[142] As in *Great Dane*, the Court did not have to decide whether the impact of the employer's conduct was inherently destructive or only comparatively slight, since in neither case had the employer shown a business justification.

The Board, in a subsequent case dealing with the scope of a striker's reinstatement rights, applied the principles of *Fleetwood Trailer* and specifically found that a refusal to reinstate strikers to

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137. *Id.* at 34.

138. 153 N.L.R.B. 425 (1965), enforcement denied, 366 F.2d 126 (9th Cir. 1966), *vacated*, 389 U.S. 375 (1967).

139. *Id.* at 426-28.

140. *See Fleetwood Trailer*, 366 F.2d at 129-130.

141. *See Fleetwood Trailer*, 389 U.S. at 378.

142. *See id.* at 380.

available positions is inherently destructive of employee rights.[143] Even though inherently destructive, however, such conduct can be justified through a balancing of interests in certain instances, such as where the employer shows that the nature of its business has changed and the jobs require skills different from those possessed by the strikers.[144]

The inherently discriminatory doctrine has most recently been applied by the Court in the *Metropolitan Edison* case,[145] wherein the Court affirmed the Board's findings that the employer's conduct was both inherently discriminatory and inherently destructive and that the employer's proffered justification was insufficient to outweigh the harm done to employee rights.[146] The union, International Brotherhood of Electrical Workers (IBEW) Local 563, and the employer were parties to a collective bargaining agreement which contained a no-strike clause. During the life of the agreement, an outsider union set up a picket line protesting the refusal of a contractor (not the employer) at the worksite to hire union workers. IBEW members, including the president and vice-president, refused to cross the picket line, which refusal was a violation of the no-strike clause. The employer disciplined all the IBEW members who refused to cross the line by imposing 5 and 10 day suspensions. It imposed a 25 day suspension, however, on the two union officers, based on both their refusal to cross the line as well as their failure to engage in affirmative efforts as union officers to enforce the no-strike pledge. The union alleged that by imposing harsher discipline on union officers the employer violated §8(a)(3).[147]

The Board, adopting the analysis of the administrative law

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143. *See* Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). The *Laidlaw* doctrine has been accepted and applied by the various circuit courts of appeal. *See, e.g.* Radio Sprinkler Fitters Union v. NLRB, 681 F.2d 11 (D.C. Cir. 1982); Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981); NLRB v. Vitronic Division of Penn Corp., 630 F.2d 561 (8th Cir. 1979); General Teamsters Local 162 v. NLRB, 568 F.2d 665 (9th Cir. 1978); NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977); Clinch Valley Clinic Hosp. v. NLRB, 516 F.2d 996 (4th Cir. 1975); H.F. Binch Co. v. NLRB, 456 F.2d 357 (2d Cir. 1972); NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971); NLRB v. Johnson Sheet Metal, Inc., 442 F.2d 1056 (10th Cir. 1971); American Mach. Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970).

144. *See, e.g., Laidlaw Corp.*, 171 N.L.R.B. at 1369 n.15; *accord Fleetwood Trailers*, 389 U.S. at 379. In such circumstances, the balancing of interests between the employee right to engage in union activity and the employer's right to maintain its business operations weighs in favor of the employer. *Id.*

145. 252 N.L.R.B. 1030 (1980), *enforced*, 663 F.2d 478 (3rd Cir. 1981), *aff'd*, 460 U.S. 693 (1983).

146. *See Metropolitan Edison*, 460 U.S. 693.

147. *Metropolitan Edison*, 252 N.L.R.B. at 1032-33.

judge, held that selecting employees for discipline based on their position as union officers was inherently discriminatory.[148] The determination of who would receive a more severe penalty was, on its face, based on who held union office. The foreseeable effect of such discrimination was inherently destructive of employee rights - it discouraged employees from holding union office.[149]

The employer's interest in ensuring the integrity of the no-strike pledge was deemed insufficient to outweigh the harm done to employee rights.[150] The employer arrogated to itself the responsibility for deciding what role union officers should play in a wildcat strike situation. This intrusion on the union's right to manage its own internal affairs resulted in the employer adversely affecting an employee's job based on what the employer perceived to be a misuse of union office. Allowing an employer to penalize an employee based on his performance as a union officer would undermine the collective bargaining process by placing the union in a subordinate position to management.[151]

The Court agreed with both the Board's legal analysis and its application of the law to the facts.[152] The somewhat conclusory finding by the Board that the conduct was inherently destructive "because it discriminates solely on the basis of union status"[153] and deters "qualified employees from holding [union] office" was embraced by the Court without any additional analysis.[154] The Court also concurred with the Board's balancing of interests, finding the Board's view consistent with the policies of the Act.[155] Allowing an employer to determine the scope of a union officer's obligations under penalty of employment-related discipline would be contrary to the process of collective bargaining envisioned by the Act.

The above cases clearly defined the general contours of the inherently discriminatory doctrine, although the specifics of its application remain somewhat unclear. While motive is a necessary ele-

148. *Id.* at 1035-36.

149. *See id.* at 1030 n. 1, 1034. *See also* Brief for the National Labor Relations Board at 20-23, Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983)(No. 81-1664).

150. *Metropolitan Edison*, 252 N.L.R.B. at 1035-36.

151. *See id.* Of course, if the union were to specifically agree with the employer and, in the contract, provide that the union officers had an affirmative duty to enforce the no-strike pledge, the employer's imposition of a harsher penalty would be justified. *Metropolitan Edison*, 460 U.S. at 706-707.

152. *See*, 460 U.S. at 702-10.

153. 460 U.S. at 702 (citation omitted). This fact actually goes to the inherently discriminatory nature of the conduct and not its inherently destructive effect.

154. *Id.* at 702-703.

155. *Id.* at 704.

ment in proving a violation of §8(a)(3), in some cases motive can be inferred from the employer's conduct itself. An employer can be held to have intended the foreseeable consequences of its conduct. This method of inferring motive can be used when the employer's conduct is inherently discriminatory. Where the employer's conduct, on its face, classifies employees based on union activity, it is inherently discriminatory. Parceling out employment benefits based on union activity has the foreseeable effect of either encouraging or discouraging union membership (depending on whether benefits are given or withheld respectively). The employer, therefore, can be held to have intended this foreseeable effect and can be found guilty of violating §8(a)(3).

If, however, the employer is able to prove[156] that its inherently discriminatory conduct was motivated by legitimate and substantial business justification, it can undercut the inference of intent drawn from its conduct where the degree of harm inflicted on employee rights is comparatively slight. Under these circumstances, specific evidence related to antiunion motive must be found in order to prove a violation of §8(a)(3).

Where the degree of harm inflicted on employee rights by the employer's inherently discriminatory conduct is inherently destructive, then even if the employer proves it acted for legitimate and substantial business reasons it can still be found to have violated

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156. It is unclear whether the employer's burden at this stage is one of production or proof. The Court tends to use the terms interchangeably in its decisions. In *Great Dane*, the Court speaks of the "employer introduc[ing] evidence" and "com[ing] forward with evidence," suggesting a burden of production. 388 U.S. at 34. Then the Court notes, however, that in this case "[t]he company simply did not meet the burden of proof." *Id.* In *Fleetwood Trailer*, the Court states that "[t]he burden of proving justification is on the employer." 389 U.S. at 378. In a footnote the court reiterates that the burden of proof is on the employer. 389 U.S. at 379 n.4 (citing *Great Dane*, 388 U.S. at 34).

Board cases, however, suggest that the Board views the employer's burden as one of proof, not merely production of evidence. *Brooks Research & Mfg., Inc.*, 202 N.L.R.B. 634, 636 (1973); *Laidlaw*, 171 N.L.R.B. at 1370; *accord Wright Line*, 251 N.L.R.B. 1083, 1088 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)(*Great Dane* supporting the shifting of the burden of proof concerning motive to the employer).

The court in *Local 1384, UAW v. NLRB*, 756 F.2d 482 (7th Cir. 1985), distinguishes between the employer's burden in a comparatively slight case versus an inherently destructive case. In the former, the employer only has a burden of coming forward with evidence of a legitimate and substantial business justification whereas in the latter, the employer carries the burden of proof of a justification. 756 F.2d at 488. This distinction makes sense in light of Frankfurter's characterization of proof of inherently discriminatory conduct as raising only an inference of motive. *See Radio Officers*, 347 U.S. at 56. Whereas when conduct is both inherently discriminatory and destructive, the Board can find unlawful motive even in the face of a justification. This implies that inherently destructive conduct establishes illegal motive as a matter of law and the employer carries an affirmative duty to prove its justification.

§8(a)(3). The Board must balance the conflicting interests to determine whether the employer's business purpose is sufficient to outweigh the destructive impact on employee rights. When the balance weighs in favor of employee rights, the employer is guilty of violating §8(a)(3).

Thus, the key concepts in applying the inherently discriminatory doctrine are: 1) identifying inherently discriminatory conduct; 2) identifying inherently destructive conduct; 3) determining what constitutes a legitimate and substantial business justification; and 4)balancing conflicting interests.

II. Defining the Key Concepts

A. Inherently Discriminatory Conduct

"The language of §8(a)(3) is not ambiguous. . . .[T]his section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited."[157] As the Supreme Court noted in *Local 357, Teamsters*, the existence of a hiring hall may indeed encourage union membership, but since the facilities of the hall were available on a nondiscriminatory basis to union members and nonmembers alike, there was no violation of §8(a)(3).[158]

Inherently discriminatory conduct is that conduct which, on its face, makes distinctions between employees based on union activity; the criterion of union membership is the basis for the employer's action.[159] The most easily identified type of inherently discriminatory conduct is that which involves simultaneous discrimination.

The *Erie Resistor* and *Great Dane* cases present examples of inherently discriminatory conduct involving simultaneous discrimination.[160] The employer classified its current workforce based on whether or not the employee had participated in strike activity and then granted a benefit (superseniority or vacation pay, respectively) to those individuals who had not participated.[161] In *Huck Mfg.*,[162]

157. *Radio Officers*, 347 U.S. at 42-43.

158. *See supra* notes 44-49 and accompanying text.

159. *See, e.g., NLRB v. Great Atlantic & Pacific Tea Co.*, 340 F.2d 690, 694 § n.6 (2d Cir. 1965); *Quality Castings Co. v. NLRB*, 325 F.2d 36, 40 (6th Cir. 1963); *Pittsburgh-Des Moines Steel Co. v. NLRB*, 284 F.2d 74, 83 (9th Cir. 1960).

160. *See supra* notes 51-58 & 134-37 and accompanying text (discussing *Erie Resistor* and *Great Dane* respectively).

161. *See also Metropolitan Edison*, 460 U.S. at 693 (dividing current workforce into two groups - union members who engaged in strike and union officers who engaged in strike - and imposing punishment based on union officer status); George Banta Co. v. NLRB, 686 F.2d

the employees engaged in a strike beginning Tuesday of the workweek. The employer paid the nonstrikers doubletime for the entire week, including the Monday before the strike began. Even though all employees had worked that Monday, the strikers were only paid straight time. As noted by the court, receipt of doubletime for Monday work was based on which employees had engaged in union activity and therefore was inherently discriminatory.[163]

Similarly, in *Bechtel Corp.*,[164] the court found the employer's conduct was inherently discriminatory. The union local was involved in an internal political dispute and the majority party members refused to work with the dissidents. The employer, therefore, divided the workforce into groups - majority and dissident factions - and hired only those on the majority list; a clear example of apportioning employment benefits based on union activities. Likewise, in *Dairylea*,[165] the collective bargaining agreement between the employer and the union contained a clause granting superseniority to union shop stewards. The clause on its face granted a job benefit (seniority) based on union activity (holding union office) and thus was inherently discriminatory.[166]

In order for the employer's conduct to be inherently discriminatory, the classification of employees must be directly based on union activity. In *P.W. Supermarkets*,[167] two employees filed a grievance seeking a wage increase, which they won. While the grievance was pending, the employer was also exploring the possibility of subcontracting the work. Upon receiving bids, the employer compared the cost of subcontracting to its own labor costs and found subcontracting to be substantially cheaper. Accordingly, the employer discharged the two workers and subcontracted the work. Without discussing the issue of inherent discrimination, the administrative law

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10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) An employer instituted a preferential reinstatement system to govern the job placement of workers after the strike ended. Under the system, cross-overs were assigned to the jobs they held before the strike began, regardless of the type of job they held during the strike. *Id.* at 18. After the cross-overs had been reinstated, the full-term strikers were reinstated to the remaining job vacancies. In finding a violation of §8(a)(3), the court noted that "the relevant question is whether the employer has illegally burdened the statutory right to strike by artificially dividing the workforce into those who did not engage in strike activity and those who did." *Id.* at 19.

162. Huck Mfg. Co. v. NLRB, 693 F.2d 1176 (5th Cir. 1982).

163. *Id.* at 1180, 1183-84.

164. NLRB v. Bechtel Corp., 328 F.2d 28, 39-40 (10th Cir. 1964).

165. Dairylea Coop., Inc., 219 N.L.R.B. 656 (1975), *enforced sub nom*, NLRB v. Milk Drivers & Dairy Employees, 531 F.2d 1162 (2d Cir 1976).

166. 219 N.L.R.B. at 658-59 n.10.

167. *P.W. Supermarkets*, 269 N.L.R.B. 839 (1984).

judge found the employer's conduct inherently destructive and violative of §8(a)(3).[168] The Board disagreed with the administrative law judge's analysis because he had overlooked the premise for such a finding - "a causal connection between an employee's protected union activities and an action by the employer detrimental to the employee's tenure. . . ."[169] The Board found that the conduct was not inherently discriminatory; the employer's decision to discharge the employees was not based on the filing of the grievance but rather on the comparative cost saving.[170]

The direct connection between union activity and the employer's conduct was also missing in *Pittsburgh-Des Moines Steel Co.*[171] In that case the employer awarded annual bonuses based on five factors, one of which was productivity. The employees at the plant at which a strike had occurred during the year in question did not receive a bonus because productivity had suffered as a result of the strike. The court held that although the strike may have caused the productivity drop, the employer's decision was, on its face, based on productivity and therefore not inherently discriminatory.[172]

A second type of inherently discriminatory conduct involves sequential discrimination.[173] In this situation, all of the employees equally suffer an employment detriment, or receive a benefit, as a result of the employer's conduct; there is no difference in treatment among the employees. The difference in treatment is measured by how the employer treated the employees as a group before union activity was present and after union activity occurred. For example, in *Jemco*, the employer denied vacation pay to all employees after a strike occurred.[174] The employer argued its conduct was not discriminatory since it treated all employees alike.[175] The court rejected that argument, holding:

> we do not believe that unequal treatment of different classes of employees is a prerequisite to finding a Section 8(a)(3) violation

168. *Id.* at 839-40.

169. *Id.* at 840.

170. *Id.* at 840-41; *cf.* Century Air Freight, Inc., 284 N.L.R.B. 730 (1987)(holding that the employer's decision to discharge the employees and subcontract the work was based on their bargaining demand for a wage increase and threat to strike in support thereof, and was therefore discriminatory conduct based on the employees' protected activity and violated §8(a)(3)).

171. Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74 (9th Cir. 1960).

172. *Id.* at 84-85.

173. *See* NLRB v. Jemco, Inc., 465 F.2d 1148 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

174. *Jemco*, 465 F.2d at 1150.

175. *Id.* at 1151.

> where all employees engaged in a concerted activity. The interpretation of Section 8(a)(3) which the company urges us to adopt would lead to the somewhat absurd result that an employer could never be found in violation of that Section so long as he was careful to treat all employees alike, no matter how destructive of employee rights his conduct may be. The Section 8(a)(3) discrimination in the present case lies in the employment benefit afforded to all employees prior to their engaging in concerted activity and the benefit which was denied to all employees after they engaged in such activity.[176]

In *Allied Industrial Workers*,[177] the employer had posted the vacation schedule but after the strike began it announced that it was delaying all vacations. The employer argued its conduct was not discriminatory because it refused to pay vacation pay to all employees, strikers and nonstrikers alike. The court disagreed, finding that a practice uniformly applied can still be discriminatory.[178] Similarly, in *United Aircraft*,[179] the employer announced wage increases of 8% the first year, and 3% the second and third years. Before the second raise was due, the employees voted for union representation and the employer did not give the raise. The court found it "difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of the right to engage in concerted activity" than the employer's conduct at bar.[180]

Lastly, inherently discriminatory conduct can involve adverse impact discrimination. In this situation, the employer's policy applies to all employees but the beneficial or detrimental impact of the policy is felt disproportionately by employees based on whether or not they engaged in union activity. For example, in *Lone Star Industries*,[181] the employer had a 23-year-old policy of assigning work based on seniority. Thus, during slack seasons, the more senior workers were fully employed and maintained their wage level, whereas junior employees saw a drop in wages due to fewer work assign-

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176. *Id.* at 1152 (footnote omitted); *see also* Kansas City Power & Light Co. v. NLRB, 641 F.2d 553, 557 (8th Cir. 1981)(stating that "[w]here all the employees engaged in a concerted activity, the requisite disparity is between the treatment of all employees *before and after the concerted activity*.")(citation omitted).

177. Allied Indus. Workers v. NLRB, 476 F.2d 868 (D.C. Cir. 1973).

178. *Id.* at 871-72.

179. NLRB v. United Aircraft Corp., 490 F.2d 1105, 1108 (2d Cir. 1973).

180. *Id.* at 1109-10; *see also* Mullins Broadcasting Co., 200 N.L.R.B. 119 (1972) (stating that the employer's conduct in reducing the employees' hours of work by 10% after the employees petitioned for a union election was inherently discriminatory).

181. Lone Star Industries Inc., 279 N.L.R.B. 550, 552 (1986), *enforced in pertinent part*, 125 L.R.R.M. 3063 (D.C. Cir. 1987).

ments. Approximately one month after the employees went on strike, the employer instituted a rotation system for assigning work, which it maintained after the strike ended. The union alleged the employer's rotation system violated §8(a)(3) whereas the employer contended there could be no violation because there was no discrimination - the policy applied uniformly to strikers and nonstrikers alike.[182]

> The short answer to this is that, although facially neutral, the policy in fact had the predictable and actual effect of creating conditions after the strike ended in which strikers would lose advantages in job assignments they had hitherto enjoyed under the 23-year-old work assignment policy and strike replacements would be the beneficiaries of those losses. . . .
>
> Obviously, the employees with the greatest seniority would tend to be those who had worked for the Respondent before the strike began; and 90 percent of Respondent's pre-strike work force went out on strike. In fact, of the strikers recalled a year after the strike commenced, only two, at most, had less seniority than the replacement. . . . Employees with substantial seniority, who would regularly be eligible to receive the better work assignments under the original long-established policy, experienced significant economic losses. . . .[7] [183]

7. The fact that the very small percentage (about 10 percent) of the prestrike work force who did not join the strike suffered similar detriment does not change our conxlusion. The change overall disfavored strikers and favored strike replacements once the strike ended; and the entire prestrike work force lost valuable rights.

The fact that the very small percentage (about 10 percent) of the prestrike work force who did not join the strike suffered similar detriment does not change our conclusion. The change overall disfavored strikers and favored strike replacements once the strike ended; and the entire prestrike work force lost valuable rights.

A similar situation arose in *Moore Business Forms*.[184] Prior to the strike, the employer operated three shifts and employees were assigned to shifts on a rotation basis. When the strike began, the employer was initially able to operate only one shift with replacement workers. As more replacements were hired and strikers crossed the line, the employer placed them on the second shift and then the third, and it instituted a fixed system of shift assignments - which-

182. *Id.*

183. *See supra* footnote 7.

184. Moore Business Forms, Inc., 224 N.L.R.B. 393 (1976), *enforced in pertinent part*, 574 F.2d 835 (5th Cir. 1978).

ever shift one was assigned to was permanent. Although the policy of fixed shifts applied uniformly to all - replacements, crossovers and strikers - the detrimental effect of the policy was felt disproportionately by the late cross-overs and full-term strikers who were permanently assigned to the less desirable shifts.[185]

In determining whether conduct is inherently discriminatory it is not sufficient to look solely at whether or not the conduct is facially discriminatory. It is also necessary to find that the foreseeable effect of such facially discriminatory conduct is to encourage or discourage union membership. "Nor does this section [8(a)(3)] outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."[186] As the Court noted in *Radio Officers*, it is "a fact of common experience - that the desire of employees to unionize is directly proportional to the advantage thought to be obtained from such action."[187] In most cases involving some form of inherently discriminatory conduct, it is obvious that the employer is granting an advantage to, or imposing a burden on, employees based on union activity; but, obvious or not, this foreseeable effect must be present.

Discrimination based on union membership which does not involve an employment advantage or disadvantage does not have the foreseeable effect of encouraging or discouraging union membership, and therefore cannot violate §8(a)(3). Such was the case in *Radio and Television Broadcast Eng'rs Union.*[188] The collective bargaining agreement between the union and the employer allowed employees to take longer unpaid leaves of absence without loss of seniority to engage in union business than for leaves unconnected to union business. The clause was clearly facially discriminatory in that eligibility for longer unpaid leaves of absence was directly based on union activity. The Board, however, found that this discrimination did not tend to encourage employees to become active unionists and thus did not violate the Act.[189]

> Instead, it merely removes, in part, a condition that would discourage employees from taking temporary union jobs. Thus, an em-

185. *Id.* at 407-08.

186. *See Radio Officers*, 347 U.S. at 43.

187. *Id.* at 46.

188. Radio and Television Broadcast Eng'rs Union, 288 N.L.R.B. 374 (1988).

189. *Id.* The section of the Act alleged to have been violated was §8(b)(2) - the union equivalent to §8(a)(3). Section 8(b)(2) provides, in pertinent part, that it is an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8](a)(3). . . ." 29 U.S.C. §158(b)(2)(1990).

> ployee who stays at his job with WPIX is no worse off with respect to seniority than an employee who takes a leave of absence to work for the Union; that employee who remains on the job is no more disadvantaged by his fellow employee's having taken the leave for that purpose than he would be if that individual had remained on the job. It is unreasonable to suppose that an employee would take an outside-the-plant union job simply to retain the seniority that he would possess even if he did not take such job.[190]

Thus, inherently discriminatory conduct is that employer conduct which, on its face, discriminates against employees based on union activity criteria. Such discrimination can manifest itself either through simultaneous, sequential or adverse impact discrimination. The discriminatory conduct must have the foreseeable effect of encouraging or discouraging union membership. This foreseeable effect is present when the result of the discrimination is gaining an employment benefit or suffering an employment-related detriment.

B. Inherently Destructive Conduct

The concept of inherently destructive conduct refers to the severity of the degree of harm inflicted on employee rights by inherently discriminatory conduct. The Court in *Great Dane* noted that the adverse effects of inherently discriminatory conduct on employee rights may be either inherently destructive or comparatively slight.[191]

The adverse effect on employee rights can manifest itself in two ways: by either the severity of the harm suffered by the employee for exercising his rights or the severity of the impact on the statutory right being exercised. Thus, the effect of a delay in paying a benefit to employees until a strike is over, at which time the employees will receive the benefit, is significantly different from the effect of refusing to pay the benefit altogether. While both acts may discourage employees from engaging in a strike, in the first situation the employees may still engage in a strike knowing they will eventually receive the benefit when the strike is over, whereas in the second situation, the employees may refrain from striking since that is the only way to ensure receipt of the benefit. Because of the difference in the degree of harm suffered by the employees - delay of benefit vs. loss of benefit - the impact of the conduct on employee rights is different. In the first instance the impact is comparatively slight; in the second

190. *Radio & Television Broadcast Eng'rs*, 288 N.L.R.B. at 384.
191. *Great Dane*, 388 U.S. at 34.

instance it is inherently destructive.[192]

A second way in which the adverse effects of inherently discriminatory conduct are felt is by the severity of the impact on the statutory rights being exercised. For example, an employer's decision to lock out employees and a refusal to reinstate strikers when vacancies exist, both impact on the right to strike. In the former case, however, the impact is only on the employees' ability to control the timing of a strike - a comparatively slight impact on the right to strike - whereas in the latter case the impact is on the employees' ability to engage in a strike at all - an inherently destructive impact on the right to strike.[193]

As more than one jurist has noted, the term "inherently destructive" has never been precisely defined by the Supreme Court.[194] Any attempt to establish guidelines for measuring the severity of harm must begin with a consideration of the Court's opinion in *Erie Resistor*,[195] the only case to date in which the Court discussed the factors which led it to conclude that the employer's conduct was inherently destructive. An important caveat to any consideration of *Erie Resistor* in this regard is that the Court's discussion is neither an exhaustive listing of factors, nor a listing of required factors for differentiating comparatively slight from inherently destructive effects. The Court in no manner suggested that its discussion was definitive; rather it is illustrative and fact specific - an examination of the specific characteristics of superseniority which made it inherently destructive.[196]

In *Erie Resistor* the destructive impact of the employer's conduct was on both the employees and the statutory rights.[197] As to the severity of harm suffered by the employees, the Court noted that the strikers' seniority would be inferior to all replacements and crossovers and that superseniority would have a lasting effect on the strik-

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192. *Compare* NLRB v. Borden, Inc., 600 F.2d 313 (1st Cir. 1979)(delay in payment of accrued vacation pay not inherently destructive) *with* NLRB v. Westinghouse Elec. Corp., 603 F.2d 610 (7th Cir. 1979)(refusal to pay vacation benefits was inherently destructive).

193. *Compare American Ship*, 380 U.S. at 310 (a lockout deprives the union of exclusive control over the timing of a strike but the right to strike does not imply the right to exclusively control timing) *with Laidlaw Corp.*, 171 N.L.R.B. at 1368-69(refusing to reinstate striker to vacant position inherently destructive of the right to strike).

194. Kansas City Power & Light Co. v. NLRB, 641 F.2d 533, 559 (8th Cir. 1981); Loomis Courier Service, Inc. v. NLRB, 595 F.2d 491, 495 (9th Cir. 1979); Johns-Manville Products Corp. v. NLRB, 557 F.2d 1126, 1144 (5th Cir. 1977) (Wisdom, J. dissenting), *cert. denied*, 436 U.S. 956 (1978).

195. 373 U.S. 221. *See supra* notes 51-89 and accompanying text.

196. 373 U.S. at 230-31.

197. *Id.* at 231.

ers. Seniority governs layoffs and an employee's seniority is relative to other employees; the fact that strikers' seniority will be inferior means that they have lost a valuable employment benefit - priority for a job when jobs are scarce. This loss is protracted because every future layoff, for as long as there are any replacements or cross-overs employed, will be determined by superseniority.

As to the severity of the impact on statutory rights, superseniority "deal[t] a crippling blow" to the right to strike and "render[ed] future [collective] bargaining difficult, if not impossible."[198] In fact, the grant of superseniority induced employees to abandon the strike and the strike collapsed ten days later. Clearly, superseniority affected not just an aspect of the right to strike but the very ability of employees to engage in a strike. Superseniority also created a conflict of interest for the union in future bargaining with the employer and undermined the union's ability to credibly use the threat of a strike as bargaining leverage in future negotiations.[199] This weakened the right of employees to "bargain collectively through representatives of their own choosing."[200]

In *Metropolitan Edison*, the Court looked to the adverse effect on statutory rights and concluded that imposing more severe penalties on employees because they were union officers "inhibits qualified employees from holding office" and is therefore inherently destructive.[201] The punishment impacted on the statutory right to hold office by deterring employees from seeking office.[202]

These cases provide some initial guidance for labeling the impact of inherently discriminatory conduct as inherently destructive. When the harm suffered by employees is the loss of a valuable employment benefit and the harm suffered is long-lasting in effect, the conduct is inherently destructive.[203] When the impact on statutory rights is such that the right is rendered nugatory (the strike collapsed) or the ability to exercise the right is severely hampered (future bargaining rendered difficult or deterrence to the right to hold

198. *Id.* at 230-31.

199. *See supra* notes 79-82 and accompanying text.

200. 29 U.S.C. § 157 (1982).

201. 460 U.S. at 703.

202. *Id.* at 702-703.

203. It is not clear from *Erie Resistor* whether the loss of the benefit alone would have been sufficient to classify the conduct as inherently destructive. 373 U.S. 221. The Court noted that both the loss and its durational effect were present. *Id.* at 234-36. As will be discussed later, subsequent cases have found a loss of benefit by itself sufficiently harmful to cause the employer's conduct to be labeled inherently destructive. *See infra* notes 206-12 and accompanying text.

union office) then the conduct is inherently destructive.

Cases in which the Board and the courts of appeal have considered the issue of inherently destructive conduct also provide useful guidance. In weighing the severity of the harm suffered by employees, both the Board and the courts have found inherently discriminatory conduct which causes loss of employment to be inherently destructive.[204] Obviously, loss of employment -whether by discharge, refusal to hire or refusal to recall - is the severest harm a worker can suffer. This view is consistent with the generally recognized principle that discharge from employment is the capital punishment of industrial relations.[205]

Less drastic measures can also cause severe harm to employees. Loss of a valuable employment benefit has been found inherently destructive. As discussed previously, *Erie Resistor* involved the loss of a valuable employment benefit - seniority - which loss also had a long-term impact.[206] Moreover, even a one-time loss of benefit can be inherently destructive. In *Westinghouse Electric*,[207] the employer denied vacation benefits to strikers while granting them to cross-overs. The court found the employer's conduct inherently destructive.[208] In *New Orleans Public Service*,[209] the employer provided tuition refunds and interest-free educational loans to all its employees except those employees who were also union officers; this policy was held to be inherently destructive. Similarly, in *United Aircraft*,[210] the employer's refusal to implement a scheduled wage increase because employees voted for the union was also inherently destructive conduct.

The benefit loss suffered by employees does not necessarily have to involve a monetary aspect. The result of the employer's inherently discriminatory conduct in *Moore Business Forms*[211] was that strikers

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204. *See, e.g.*, NLRB v. Haberman Constr. Co., 641 F.2d 351 (5th Cir. 1981) (discussing constructive discharged); NLRB v. Bechtel Corp., 328 F.2d 28 (10th Cir. 1964) (discussing refusal to hire); Swift Indep. Corp., 289 N.L.R.B. 423 (1988) (discussing discharge); Garland Coal & Mining Co., 276 N.L.R.B. 963 (1985) (discussing discharge); Wintz Motor Freight, Inc.,265 N.L.R.B. 922 (1982) (discussing discharge); Laidlaw Corp., 171 N.L.R.B. 1366 (1968) (discussing refusal to reinstate).

205. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 661 nn. 60 & 62 (4th ed. 1985).

206. 373 U.S. at 230-31.

207. 603 F.2d 610 (7th Cir. 1979).

208. *Id.* at 617. *Great Dane* also involved the denial of vacation benefits to strikers, but the Court did not have to decide whether the effect was comparatively slight or inherently destructive, as the employer failed to come forward with any evidence of a legitimate business justification for its inherently discriminatory conduct. 388 U.S. at 34-35.

209. 197 N.L.R.B. 725 (1972).

210. 490 F.2d 1105 (2d Cir. 1973).

211. *Moore Business Forms*, 224 N.L.R.B. 393 (1976), *enforced in pertinent part*, 574

were assigned to less desirable work shifts. Although this did not cause the strikers to lose any money, this change in working conditions requiring strikers to work at less desirable times of the day was held to be inherently destructive.[212]

Other cases have considered the severity of the impact on the statutory right. Where the effect of the employer's inherently discriminatory conduct significantly impedes or interferes with the exercise of a statutory right, or threatens the viability of, or frustrates, a statutory right, the conduct is inherently destructive.[213] Giving a written warning to a steward for investigating a grievance does not impose severe harm on the employee - a written warning being a relatively insignificant infringement on employment - but it does significantly impede the exercise of a fundamental statutory right - the administration of the collective bargaining agreement.[214]

> Without this right, protection of any preceding and supportive concerted activity becomes useless and a sham. Interfering with and discriminating against a union steward for pursuing his responsibility in this respect, of necessity, has a significant effect upon employees and is inherently destructive of important employee rights, for it threatens to reduce all of their protected activity to an exercise in futility.[215]

In *Swift Independent Corporation*,[216] the employer closed its plant because the union would not agree to a midterm modification of the contract, with the intent of subsequently reopening the plant under new terms and conditions of employment. The employer's conduct, designed to evade its obligations under its collective bargaining agreement with the union, frustrated the process of collective bargaining and therefore was inherently destructive.[217]

United States Pipe & Foundry Company[218] presented a situation where the employer engaged in strikebaiting. The employer and

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F.2d 835 (5th Cir. 1978); *see supra* note 184 and accompanying text.

212. *Id.* at 394-95.

213. *See, e.g., Kansas City Power & Light*, 641 F.2d 553, 559 (8th Cir. 1981); *Haberman Constr. Co.*, 641 F.2d 351, 359 (5th Cir. 1981); Swift Indep. Corp., 289 N.L.R.B. 423 (1988).

214. Consumers Power Co., 245 N.L.R.B. 183 (1979).

215. *Id.* at 187.

216. 289 N.L.R.B. 423 (1988).

217. *Id. See also* Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979) (stating that termination of union employees to escape economic obligations imposed by the collective bargaining agreement is inherently destructive).

218. 180 N.L.R.B. 325 (1969), enforced *sub nom* Local 155, Int'l Molders & Allied Workers Union v. NLRB, 442 F.2d 742 (D.C. Cir. 1971).

union were at impasse over the terms of a new agreement when the employer announced its intention to institute certain reductions in benefits not at issue in the current negotiations, which would be rescinded upon the union's agreement to a new contract. The employer's purpose in reducing benefits was to bring economic pressure on the employees to either agree to the employer's last proposal or to strike during the winter months when work was slow. The employer's conduct, aimed as it was at precipitating a strike, was found by the administrative law judge to be "inimical to the statutory purposes and reveals a purpose inconsistent with good-faith bargaining.. . . [such conduct] constitute[s] consequences visited on employees for adhering to their Union [which] are 'inherently. . .prejudicial to union interests.' "[219] The court of appeals agreed with the administrative law judge's characterization of the conduct as inherently destructive. "To seek to force the Union's hand as here was done, by action designed to control and to dilute the statutorily protected strike initiative belonging to the Union, can reasonably be considered as too prejudicial to employee rights and the bargaining process to escape the condemnation of the Act."[220] The employer's conduct undermined the viability of the right to strike by attempting to control the strike initiative which is a right vested exclusively in the employees.

In attempting to assess the impact which certain employer conduct has on employee rights, particularly in reference to the right to strike, Professor Estreicher has proposed the principle of "bounded conflict."[221] His premise is that ". . .while economic conflict is an essential, legitimate feature of our collective bargaining system, a strike should ordinarily not provide an occasion for terminating the bargaining relationship. The strike is a means of resolving a dispute, not destroying the underlying bargaining structure."[222] To the extent that an employer's conduct threatens the survival of the bargaining structure, it is inherently destructive.

An employer's inherently discriminatory conduct is inherently destructive when it severely harms an employee due to loss of employment or a valuable employment benefit, or when its impact significantly interferes with the exercise of a statutory right or undermines the viability of a statutory right.

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219. *Id.* at 328.
220. *Local 155, Int'l Molders*, 442 F.2d at 748.
221. Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287,288 (1987).
222. *Id.* at 288.

C. *Legitimate and Substantial Business Justification*

One must consider what types of employer interests constitute legitimate and substantial business justification. It is important to keep in mind that certain interests which may be sufficient to justify conduct that has a comparatively slight impact on employee rights will not necessarily be deemed sufficient to outweigh an inherently destructive impact.

Secondly, the use of the adjective "substantial" signifies that the legitimate business justification must be "nonfrivolous."[223] Where the proffered legitimate business justification is based on speculation or is not reasonable, the justification will not be considered substantial. The employer may rely on a provision in a collective bargaining agreement to justify inherently discriminatory conduct. This reliance must be based on a reasonable and arguably correct interpretation of the contract.[224] If the employer's contract interpretation is unreasonable, it does not rise to the level of a substantial business justification.[225] Similarly, an employer's inherently discriminatory conduct of refusing to make tuition benefits available to union officials, based on its fear of possibly violating §8(a)(2) of the NLRA[226] and §302 of the Labor Management Relations Act,[227] was held to be violative of §8(a)(3) since its fear of possibly violating these statutes was unfounded.[228]

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223. Harter Equipment, 280 N.L.R.B. 597, 600 n.9 (1986) (stating. "[w]e do not regard the Court's reference to 'substantial' justification in *Great Dane Trailers* as meaning anything more than nonfrivolous.").

224. Glover Bottled Gas Corp., 292 N.L.R.B. No. 99 (1989); Texaco, Inc., 285 N.L.R.B. 291 (1987).

225. *See* Texaco, Inc., 291 N.L.R.B. No. 86 (1988). The employer terminated the payment of accident and sickness benefits to strikers claiming the termination was justified by the language of the contract. The Board found the employer's interpretation of the contract language unreasonable and since no justification existed for the inherently discriminatory conduct, the employer violated §8(a)(3). *Id.* The employer's reliance on contract language to postpone payment of vacation benefits to strikers, however, was found to be reasonable and therefore constituted a legitimate and substantial business justification. *Id.*

226. 29 U.S.C. §158(a)(2)(1982) (providing, in pertinent part, that it is an unfair labor practice for an employer "to contribute financial or other support to" a labor organization).

227. 29 U.S.C. §186 (1982) (prohibiting, *inter alia*, the payment of money by an employer to officers of any labor organization which represents the employer's employees, but excepts any payment made as compensation by the employer to its employees).

228. New Orleans Pub. Serv., 197 N.L.R.B. 725. *Compare* Mullins Broadcasting Co., 200 N.L.R.B. 119 *with* A.S. Abell Co. v. NLRB, 598 F.2d 876 (4th Cir. 1979). In Mullins Broadcasting Co., after a union organizing campaign commenced, the employer decided to reduce labor costs by 10% by revising work schedules. 200 N.L.R.B. 119. Its justification for this inherently discriminatory conduct was its belief that the union would win a representation election. It wanted to build in some bargaining room so that when the union made wage demands in bargaining, the employer could agree without actually increasing its labor costs. *Id.*

Legitimate business justifications tend to fall within one of three categories: 1)justification based on managerial prerogative; 2)justification based on the employer's desire to gain or enhance its bargaining leverage; and 3)justification based on the effectuation of statutory policy. The majority of cases fall within the first category.

Managerial prerogative refers to that authority which an employer needs to possess in order to successfully manage and operate its business.[229] The ability to rely on, and enforce, contractual rights is a necessary adjunct to operating a business. Thus, an employer's reliance on "nondiscriminatory contract interpretation that is reasonable and arguably correct . . . [is] sufficient to constitute a legitimate and substantial business justification for its conduct."[230] While the employer was relying on the contractual no-strike clause - legitimate business consideration - to justify its conduct in *Metropolitan Edison*,[231] its justification was not sufficient because it was not substantial. Its interpretation of the no-strike clause as imposing an affirmative duty on union officials was unwarranted.[232]

Successful operation of a business often depends on the ability to protect confidential information. Thus, an employer's action based on a legitimate need to protect confidential information from unauthorized disclosure constitutes a legitimate business justification. In *Raytheon Missile*,[233] the employer transferred an employee from the Industrial Relations Department, where she had access to all the employer's personnel and labor relations data and policies, because she

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The employer's justification, however, was based entirely on speculation - the representation election had not been held and no wage demands had been made - and was therefore not a substantial justification. *Id.*

In *A.S.Abell*, the employer adopted a policy not to employ any union member who had previously worked for another newspaper until clarification was forthcoming concerning who had been responsible for a riot which had occurred during a strike at the other paper, resulting in physical violence and property damage. The employer feared a repetition of the damage at its place of business. 598 F.2d 876. The court found the employer's fears were reasonable in view of the difficulty of identifying those responsible for the riot, the fact that the investigation into the issue of responsibility was continuing, and the prevailing uncertainty of the union's trustworthiness. Thus the employer provided a substantial business justification for its inherently discriminatory conduct. *Id.*

See also NLRB v. Hudson Transit Lines, 429 F.2d 1223, 1231 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) (stating that an employer defense based on probable strike was no justification where possibility of strike was remote and tenuous).

229. *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 457-58 (4th ed. 1985).

230. Glover Bottled Gas Corp., 292 N.L.R.B. No. 99, slip op. at 3.

231. 460 U.S. 693. *See supra* notes 147-57 and accompanying text.

232. *Metropolitan Edison Co.*, 460 U.S. at 703-704. *See supra* notes 223-28 and accompanying text (discussing the meaning of "substantial" justification).

233. Raytheon Missile Sys. Div., 279 N.L.R.B. 245 (1986).

had attended a union meeting. The employer's conduct was inherently discriminatory - the decision to transfer being based solely on participation in a union activity - but the employer established a legitimate and substantial business justification based on its desire to avoid placing the employee in a conflict of interest which could jeopardize its confidential labor relations material.[234]

Hiring employees qualified for the job is an essential aspect of managerial prerogative. Even though a refusal to reinstate a striker when a vacancy occurs is inherently destructive, an employer's interest in hiring qualified workers outweighs the harm to employee rights where the employer shows that the striker lacks the requisite skill to perform the job in question.[235]

An essential feature of managerial prerogative is that the authority claimed as a prerogative must be *necessary* to the management of the business. Ease of operation or convenience does not rise to the level of managerial prerogative. An employer's proffered justification of administrative convenience for requiring replaced strikers to execute a form semi-annually indicating their continued interest in recall was not sufficient to establish a legitimate business justification.[236] Likewise, an employer's desire to avoid dissension among the workers did not present a legitimate business justification for a pay differential between strikers and nonstrikers.[237]

A second type of justification is based on the employer's desire to gain or enhance its bargaining leverage. The Supreme Court considered the legitimacy of such a justification in *American Ship*.[238] The Court noted that an employer's actions taken simply to support its bargaining position should be distinguished from actions indicating a hostility to the collective bargaining process. "[B]ringing economic pressure to bear in support of [a] legitimate bargaining position" is a legitimate business justification sufficient to justify employer conduct *which does not have an inherently destructive impact* on employee rights.[239]

In *Kaiser Steel*[240] the employer's machinists furnished their own tools which they stored at the plant. Normally, the employees were allowed to take their tools home if they needed them to do work

234. *Id.*
235. Laidlaw Corp., 171 N.L.R.B. 1366 (1968).
236. *See* Vitronic Div. of Penn Corp., 239 N.L.R.B. 45(1978), *enf'd*, 630 F.2d 561 (8th Cir. 1979).
237. *See Huck Mfg. Co.*, 693 F.2d 1176.
238. 380 U.S. 300 (1965). *See supra* notes 115-33 and accompanying text.
239. 380 U.S. at 318.
240. NLRB v. Kaiser Steel Corp., 700 F.2d 575, 576 (9th Cir. 1983).

away from the plant. During the strike, however, the employer refused to allow the employees to remove their tools. The purpose for its policy was the desire to achieve leverage in collective bargaining.[241] Although the employer's policy was inherently discriminatory - sequential discrimination in treatment before and after the employees engaged in union activity - its impact was found to be comparatively slight.[242] The court held that the employer's intention to put pressure on the union during bargaining constituted a legitimate business justification, citing to *American Ship*.[243]

A final category of justification is based on effectuation of statutory policy. In this circumstance, the employer claims that while its conduct may adversely impact the exercise of a statutory right, it is justified because its conduct is also serving to effectuate a statutory policy. The benefit to statutory interests gained from the conduct outweighs any disadvantages to statutory rights which the conduct may cause.

In the *Brown Food* case,[244] the Supreme Court determined that the employers' conduct in locking out their employees and continuing operations with replacement workers had, under the circumstances, a comparatively slight impact on employee rights. It then considered the employers' justification - the conduct was designed as a defensive measure to preserve the integrity of the multi-employer bargaining group from the destructive effect of the union's whipsaw strike.[245] The Court cited to its opinion in *Buffalo Linen*[246] wherein it had discussed the role of multi-employer bargaining units as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."[247] The Court found that the employer's conduct was "reasonably adapted to the achievement of a legitimate end" and accordingly not in viola-

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241. Without their tools, the machinists would find it extremely difficult to obtain temporary employment with another employer for the duration of the strike. *Id.* Losing the ability to supplement their incomes during a strike pressured the employees to capitulate sooner. *Id.* at 577.

242. The court determined the impact was only comparatively slight because the policy had no long-term effect on the strikers, it did not significantly interfere with the right to strike, and the union could have avoided any impact altogether simply by telling the employees to take their tools with them before the strike started. *Id.* at 577.

243. *Id.* at 577 n.3.

244. 380 U.S. at 287-88. *See supra* notes 89-114 and accompanying text.

245. *Id.* at 284, 289.

246. *Id.* at 289 n.4 (citing NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957)).

247. *Buffalo Linen*, 353 U.S. at 95.

tion of §8(a)(3).[248]

A statutory justification was also proffered by the employer to justify superseniority for union stewards in *Dairylea*.[249] The employer and union were parties to a collective bargaining agreement containing a clause which awarded superseniority to union stewards for all contractual benefits. The superseniority clause was inherently discriminatory. It tied the grant of a benefit to a worker's status as a union officer. The foreseeable effect was to encourage employees to be good union members so as to qualify for union office and thus be eligible for the enefit.[250] This effect was also inherently destructive. Employees who are not union stewards lose a valuable benefit - their relative seniority standing which controls layoffs, recalls and other contract benefits, similar to the loss suffered by the employees in *Erie Resistor*.[251] The statutory right to refrain from engaging in union activities is significantly hampered. Tying a valuable benefit to engaging in union activities deters employees from refraining from such activities.[252] This inherently destructive effect,[253] however, is outweighed by the legitimate and substantial statutory objectives served by the grant of superseniority limited to layoff and recall:

> The lawfulness of such restricted superseniority is, however, based on the ground that it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. It thereby not only serves a legitimate statutory purpose but also redounds in its effects to the benefit of all unit employees. Thus, superseniority for layoff and recall has a proper aim and such discrimination as it may create is simply an incidental side effect of a more general benefit accorded all employees.[254]

The *Dairylea* case went beyond merely recognizing that inherently destructive conduct may be justified when it also serves to effectuate a statutory policy. It also implicitly noted that a justification

248. *Brown Food*, 380 U.S. at 289.

249. 219 N.L.R.B. 656 (1975). The union was also charged with a violation of §8(b)(2).

250. *Id.*

251. 373 U.S. 221 (1963). *See supra* note 197 and accompanying text.

252. *Cf.*, *Metropolitan Edison*, 460 U.S. 693 (1983) (imposing penalties on employees for holding union office inhibits employees from holding office and is inherently destructive). *See supra* notes 201-202 and accompanying text..

253. *But see* Local 1384, UAW v. NLRB, 756 F.2d 482, 494 (7th Cir. 1985)("[w]e do not, of course, decide that superseniority preferences [for union stewards] are inherently destructive"); NLRB v. American Can Co., 658 F.2d 746, 756 (10th Cir. 1981)("[t]he conflict here [superseniority for union stewards] is not so inherently destructive of important employee rights that it should be held to be unlawful in spite of legitimate justification.").

254. *Dairylea*, 219 N.L.R.B. at 658 (footnote omitted).

is legitimate and substantial only to the extent that the inherently discriminatory conduct is narrowly tailored to achieve the proffered justification. The justification for superseniority was to ensure the presence of the union steward at the worksite so that he would be available to resolve contractual grievances as they arose. Superseniority for layoff and recall purposes is directly related to ensuring the steward's continued presence in the work place. Superseniority for other contract benefits - vacation time or job assignments - is not related to the steward's presence and does nothing to further the claimed justification. That aspect of the superseniority clause in *Dairylea* was, therefore, unlawful.[255]

The proposition that a business justification is legitimate and substantial only to the extent that the conduct in question is directly related to, and narrowly tailored to serve, the justification has been relied on by the Board in subsequent cases.[256] In *Gulton Electro-Voice, Inc.*,[257] the superseniority clause was limited to layoff and recall, but those eligible for superseniority included not only the union steward but seven other union officers. The Board found that this extension of superseniority was beyond the scope of the asserted justification for its existence, and, therefore, in violation of §8(a)(3).[258]

> It is the immediacy of attention that stewards can offer that place the stewards in such a special position. Further, steward job-retention superseniority is necessary to the steward's ability to carry out the primary duties of their union position. However, superseniority is inherently discriminatory and the steward's need to maintain an on-the-job presence does not generally apply to officers; thus the justification used for stewards does not extend to officers generally - unless the latter perform steward-like duties.[259]

In *Freezer Queen Foods, Inc.*,[260] at the conclusion of the strike the employer reinstated the strikers but treated probationary employees who had gone out on strike as new hires. The employer

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255. *Id.* at 658-59.

256. *See* Gulton Electro-Voice, Inc., 266 N.L.R.B. 406 (1983), *enforced sub nom.* Local 900, Int'l Union of Electrical Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984); George Banta Co., 256 N.L.R.B. 1197 (1981), *enforced*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Freezer Queen Foods, Inc., 249 N.L.R.B. 330 (1980); Moore Business Forms, 224 N.L.R.B. 393 (1976), *enforced in part and rev'd in part*, 574 F.2d 835 (5th Cir. 1978).

257. 266 N.L.R.B. 406 (1983), *enf'd sub nom.* Local 900, Int'l Union of Electrical Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

258. 266 N.L.R.B. at 409.

259. *Id.* at 408.

260. 249 N.L.R.B. 330 (1980).

pointed to the collective bargaining agreement providing that new hires were to be treated as probationary employees for a 60-day period before being awarded regular employee status. If a probationer missed seven consecutive work days he lost any time accumulated toward the 60-day goal. The employer argued that since the probationary employees had missed more than seven days due to the strike they had to start the probation period over again. The purpose of the probation period was to allow the employer time to observe and evaluate new employees to determine whether they were qualified for permanent employment. Hiring qualified employees has been recognized as a managerial prerogative and thus a legitimate business justification. The Board held, however, that the employer in this case had failed to advance a legitimate and substantial business justification.[261] The employer offered no reason why tolling the probation period during the strike would not serve its purpose. The employer's conduct in treating the probationers as new hires was not narrowly tailored to achieve its stated justification. "Respondent has not established that this policy, as opposed to other less destructive policies which would achieve the same end of allowing observations of new employees for a substantial uninterrupted period of time, serves any legitimate or substantial business or economic purpose."[262]

A similar result was reached in *Moore Business Forms*.[263] The employer changed a rotating shift assignment policy to a fixed assignment policy which resulted in the replacements and cross-overs being assigned to the best shifts and the full-term strikers being permanently assigned the least desirable shifts. The administrative law judge noted that while this change "may well have been justified as a temporary exigency by the reduced number of employees and the need to train replacements during the strike, there was no showing that, once the work force was stabilized and trained, the continuation of the fixed shifts" was necessary.[264] Thus, the employer failed to establish a business justification for its inherently discriminatory and destructive conduct and was found to have violated §8(a)(3).[265]

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261. *Id.* at 331.

262. *Id.* (footnote omitted). This concept is analogous to the lesser discriminatory alternative aspect of the adverse impact theory in employment discrimination law. Under Title VII, a facially neutral employment practice which adversely impacts on a protected group, even if justified by a legitimate business purpose, is unlawful if a lesser discriminatory alternative exists which would equally serve the stated business purpose. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 462 (1989).

263. 224 N.L.R.B. 393. *See also supra* notes 211-12 and accompanying text.

264. *Moore*, 224 N.L.R.B. at 407.

265. *Id.* at 408.

This rationale was also relied on by the administrative law judge in rejecting the employer's asserted justification in *George Banta Co.*[266] The employer instituted a preferential reinstatement system after the strike. Under this system, cross-overs were reinstated to their pre-strike jobs, irrespective of what job they had performed during the strike. Then full-term strikers were reinstated to remaining jobs based on seniority. The employer offered several justifications based on managerial prerogative interests - placing cross-overs in jobs and departments with which they were familiar, avoiding retraining and constant bumping and controlling rate retention.[267] The administrative law judge noted, however, that "management could have achieved essentially these same business objectives without drawing a line of demarcation between 'cross-over' and returning striker."[268] The system was found to violate §8(a)(3).

Recognized justification for inherently discriminatory conduct generally falls into one of three categories - managerial prerogative, bargaining leverage and effectuation of statutory policy. The justification must not only be legitimate but also substantial, which requires that the justification be nonfrivolous, reasonable and non-speculative. Lastly, the conduct being justified must be directly related to, and narrowly tailored to achieve, the asserted justification.

D. Balancing Conflicting Interests

Assuming the employer has established a legitimate and substantial business justification, the Board may still find a violation of §8(a)(3) if the employer's inherently discriminatory conduct is inherently destructive and the Board determines that the proffered justification does not outweigh the destructive impact on employee rights. This latter task requires the Board to engage in a balancing of conflicting interests.

This is an area which has a minimum of specific guidelines and allows a maximum measure of discretionary action. The purpose behind the balancing of interests is to find that result which best effec-

266. 256 N.L.R.B. 1197 (1981), *enforced*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

267. 256 N.L.R.B. at 1220.

268. *Id. See also* Raytheon Missile Sys. Div., 279 N.L.R.B. 245 (1986); *supra* notes 233-34 and accompanying text. In upholding the employer's justification of preserving confidential business information against a claim that the transfer of an employee violated §8(a)(3), the Board noted that the job to which the employee was transferred constituted a promotion with an attendant increase in pay. The employer achieved its business purpose with the least possible harm to the employee. *Id.* at 248.

tuates national labor policy.[269] That is not to imply that employee statutory rights always outweigh the employer's legitimate and substantial business justifications. National labor policy recognizes that the rights granted to employees under the Act "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon . . . [the] employee[s]."[270]

The responsibility for engaging in this balancing of interests resides primarily in the Board, subject to limited judicial review.[271] So long as the Board's findings are supported by substantial evidence[272] and adequately and rationally explained[273] its judgment should be upheld.

Congress, in enacting the NLRA, did not attempt to exhaustively detail the rights and responsibilities of the respective parties. Its purpose in creating a specialized administrative agency such as the National Labor Relations Board was to take advantage of the specialized labor relations experience of the members of the Board, who would interpret and apply the general provisions of the Act to the peculiar complexities of industrial life.[274] The Board's role is to carefully appraise the competing interests in light of the particular circumstances involved, and apply its special understanding of the realities of industrial relations, in order to arrive at a result which will best effectuate national labor policy.[275]

Beyond these broad generalities, there is little specific direction provided for the Board, or by the Board, as to how to perform this appraisal. At least one court has suggested that where the balance between the two interests is a close question, "evidence concerning the motivation of the employer would become an important element."[276] This proposal may have merit when the employer's justification is based on statutory rights, but if the balance is between statutorily protected interests and business interests, a close call should weigh in favor of employee statutory rights.

Unfortunately, a consideration of those cases where the balancing test was used does not present much instruction in applying the

269. *Erie Resistor*, 373 U.S. at 236.
270. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).
271. *Buffalo Linen*, 353 U.S. at 96.
272. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-91 (1951).
273. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
274. *Republic Aviation*, 324 U.S. at 800.
275. *Erie Resistor*, 373 U.S. at 236.
276. NLRB v. National Seal, 336 F.2d 781, 784 (9th Cir. 1964).

test.[277] The discussion tends to be conclusory, often noting merely that the claimed business justification does not outweigh the harm to employee rights, without stating why.[278] The Board in *Erie Resistor* considered the employer's claim of necessity - a managerial prerogative justification that the offer of superseniority was necessary in order to procure strike replacements which in turn was necessary in order to continue successfully operating its business during the strike - and found that it did not outweigh the harm to employee rights.

> Surely every employer faced with a strike, or any other form of union activity, will be first concerned with the well-being of his business. There is, moreover, no doubt that a strike may increase the intensity of this concern, for the primary purpose of most strikes is to apply economic pressure to strengthen the union's bargaining demands. But we do not believe that the effectiveness of a strike, or the difficulty an employer may have in securing replacements, can sanction the pervasive form of preferred treatment here utilized by the Employer.[279]

In *Bechtel Corp.*,[280] the court agreed with the Board that the employer's legitimate business justification did not outweigh the harm to employee rights. The employer's decision to hire only union members who were in the majority faction of the union, rather than dissidents, was prompted by a desire to avoid both dissension among the work force and probable work stoppages,[281] and to secure a sufficient labor supply.[282] But this managerial interest in operating the business could not outweigh the harm done to the dissidents by denying them employment based on the exercise of their Section 7 rights.

On the other hand, some managerial prerogatives will outweigh the harmful effects of some types of inherently destructive conduct. While a refusal to reinstate an economic striker to a vacant position is inherently destructive, if the refusal is based on a change in operation resulting in the striker no longer being qualified for the job, the

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277. *See* NLRB v. Truck Drivers Local Union, 353 U.S. 87, 96 (1957) (holding that the function of striking the balance is difficult and delicate and should be left primarily to the National Labor Relations Board).

278. *See Erie Resistor*, 373 U.S. at 236-37.

279. *Erie Resistor*, 132 N.L.R.B. at 630 (footnotes omitted).

280. 328 F.2d 28. *See supra* note 164 and accompanying text.

281. This justification was reasonable and not speculative. Previously, the employer had hired two dissidents and the other workers had gone on strike. 328 F.2d at 37.

282. The supply of dissidents was not sufficient to man the job. *Id.* at 37 n. 7. If the employer continued to hire regardless of union politics, there were not enough workers who would work with the dissidents to complete the project. *Id.*

conduct is justified and therefore not a violation of §8(a)(3).[283] That justification, unlike the ones offered in *Erie Resistor* and *Bechtel*, actually changes the nature of the employer's conduct. Before the justification is offered, the evidence suggests that the striker used to work for the employer, the employer needs to hire a worker, but instead of hiring the employee who engaged in a strike it hires a stranger who did not strike. This decision, on its face, appears to be based on strike activity. By proving a justification, however, the refusal to reinstate is no longer inherently discriminatory because now the basis for the employer's decision is lack of qualification for the job, not union activity. Whereas, in *Erie Resistor* and *Bechtel*, the employer's justification does not change the nature of its conduct. The award of superseniority is still based on strike activity and job opportunities are still based on union political beliefs.

Justification based on bargaining leverage will not outweigh the harm caused by inherently destructive conduct. As discussed previously,[284] the Supreme Court considered the legitimacy of this justification in *American Ship* and held that it was sufficient to justify employer conduct which was *not* inherently destructive.[285] The Court in *American Ship* did not find the employer's conduct inherently destructive - the impact of the employer's act did not destroy the union's ability to effectively represent the workers nor frustrate the bargaining process.[286] But, where the impact of the employer's conduct is inherently destructive, the desire to gain bargaining leverage is no longer a sufficient justification. The impact of the employer's conduct has fallen outside the "bounded conflict."[287] The destructive impact indicates a hostility to the process of collective bargaining - it significantly impedes the exercise of, or frustrates, a basic statutory right.[288]

That the desire to gain bargaining leverage as asserted justification is treated differently when the impact of employer conduct is comparatively slight as opposed to inherently destructive is based on the difference in the Board's role of assessing justification when the impact differs. In a comparatively slight situation, the Board's only role is to determine whether the justification is legitimate and sub-

283. Laidlaw Corp., 171 N.L.R.B. 1366 (1968).
284. *See supra* notes 238-39 and accompanying text.
285. *American Ship*, 380 U.S. at 318.
286. *Id.* at 309.
287. *See supra* note 221 and accompanying text.
288. *See generally*, Estreicher, *supra* note 236, at 288 (suggesting that when a party's conduct falls outside of the "bounded conflict" it is actually ignoring the rules established to guarantee that the bargaining structure lasts throughout the conflict).

stantial. The desire to gain bargaining leverage is substantial in that it is both reasonable and nonspeculative - the parties have not reached agreement, indicating that the employer's current bargaining leverage is insufficient to persuade the union to agree to its proposals. The legitimacy of this objective was recognized by the Supreme Court in *NLRB v. Insurance Agents' International Union*: "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[289]

Having determined that the justification is both legitimate and substantial, the Board's role in a comparatively slight case is at an end. Unless there is independent proof of antiunion animus, there is no violation of §8(a)(3). The Board is not empowered, in this situation, to act as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."[290] Nevertheless, that is precisely the type of authority which the Board is given in inherently destructive cases. In such situations, the use of economic weapons which are inherently prejudicial to union interests give the employer too much power. Unlike the comparatively slight case where the use of the economic weapon can be viewed as "part and parcel" of the collective bargaining process, the use of such weapons which are inherently destructive exceed the limits of "bounded conflict."[291] "[T]here are limits to the weapons the parties may use, precisely because of the devastating impact particular tactics would have on the continuation of the bargaining relationship at the strike's conclusion."[292]

Likewise, the court in *Local 155, Molders* determined that the employer's conduct had an inherently destructive impact and the employer's interest in gaining bargaining leverage by bringing pressure on the union did not outweigh the harm done to employee rights.[293]

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289. 361 U.S. 477, 489 (1990).

290. *Id.* at 497.

291. *See, e.g.*, Estreicher, *supra* note 236 at 288.

292. *Id.*

293. Local 155, Int'l Molders & Allied Workers Union v. NLRB 442 F.2d 742, 746 (D.C. Cir. 1971). *See also* International Bhd. of Boilermakers, Local 88 v. N.L.R.B., 858 F.2d at 767-68 (stating that "if the employer's conduct is not inherently destructive. . .then there is no violation. . .when the employer's purpose is 'merely to bring about a settlement of a labor dispute on favorable terms.' "); *Kaiser Steel Corp.*, 259 N.L.R.B. 643 (1981), *enforcment denied*, 700 F.2d 575 (9th Cir. 1983). The administrative law judge, whose decision was adopted by the Board, found that the employer's desire to achieve bargaining leverage did not outweigh the inherently destructive effect of its conduct. The court denied enforcement based on its finding that the impact of the employer's conduct was only comparatively slight and therefore

Inherently destructive conduct justified by the effectuation of statutory policy can outweigh the harm to employee rights. As the Board stated in *Dairylea*, such conduct has a proper aim and the detrimental effect it creates is only a side effect of the advantages gained from the conduct.[294]

The easier balancing cases involve justification based on bargaining leverage, which will not outweigh the harm caused, or statutory policy, which will probably outweigh the harm. Justification based on managerial prerogatives continues to require the Board to bring to bear its specialized expertise and evaluate each situation in light of the complexities of modern industrial relations.

III. Applying the Doctrine

The issue presented in *Harter Equipment, Inc.*,[295] was whether an employer violates §8(a)(3) if it locks out its employees and hires temporary replacements solely for the purpose of bringing economic pressure to bear in support of a legitimate bargaining position. The employer and the union had an eight year bargaining relationship. During negotiation for a new agreement, the employer told the union it was experiencing major financial problems and was going to be seeking wage reductions and changes in the union security clause. The union opposed the proposed changes, offering instead to extend the current agreement for six months. The employer rejected any contract extension and informed the union it would not let the employees work without a contract. When the employer and union were unable to reach agreement on a new contract upon expiration of the old one, the employer locked out the employees. Approximately a month and a half later, the employer hired temporary replacements. As of the date of the administrative hearing in the case (a year later) the employer was still operating with temporary replacements.[296]

International Brotherhood of Boilermakers, Local 88 v. NLRB (National Gypsum),[297] presented the same legal question as *Harter Equipment* but with slightly different facts. In this case, the employer and union had a nearly 40 year bargaining relationship.

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a desire to achieve bargaining leverage was a legitimate and substantial business justification. *See supra* notes 240-43 and accompanying text.

294. 219 N.L.R.B. at 658. *See supra* notes 249-54 and accompanying text.

295. 280 NLRB 597 (1986), *aff'd sub nom* Local 825, Int'l Union of Operating Eng'rs v. NLRB, 829 F.2d 458 (3rd Cir. 1987).

296. 280 N.L.R.B. at 597. Indeed, five years later, the employer was still operating with temporary replacements. *Harter Equip., Inc.*, 293 N.L.R.B. No. 79 (1989).

297. 858 F.2d 756 (D.C. Cir. 1988).

When their contract expired, the parties were still at odds over a wage increase, insurance cost containment and a management rights clause. As a result of the inability to reach an agreement, the employer locked out the employees and for the first six weeks continued operations using supervisory and non-unit personnel. After six weeks, the employer hired temporary replacements to continue operations. Three months later, the parties resolved their differences and executed a new agreement. The lockout ended and the regular employees returned to work.[298]

The Board's decision in *Harter Equipment* is based on the inherently discriminatory doctrine and begins with an examination of the Supreme Court's lockout cases, *American Ship* and *Brown Food*.[299] An initial flaw in the use of these cases is the attempt to build a syllogism based on a faulty major premise. The Board majority reasoned that since *American Ship* sanctioned employer lockouts, whether for offensive or defensive purposes, in the absence of antiunion motive, and *Brown Food* found the use of temporary replacements during a defensive lockout under the particular facts of that case lawful, therefore employer lockouts utilizing temporary replacements do not violate the Act.[300] The majority's unspoken assumption in its interpretation of *American Ship* is that all lockouts, whether offensive or defensive, are the same; that they are treated alike for all purposes.

Thus, what an employer is allowed to do in a defensive lockout (*Brown Food*), it is allowed to do in an offensive lockout (*Harter Equipment*). The flaw in this syllogism is the Board's interpretation of *American Ship*. To say that offensive lockouts are legal as well as defensive lockouts, is *not* to say that they are alike or should be treated the same for all purposes.

Secondly, the Board concluded that since the Court found the use of temporary replacements in *Brown Food* to have only a comparatively slight effect on employee rights, the use of temporary replacements during lockouts under any circumstances (in the absence of antiunion animus) only has a comparatively slight effect.[301]

Lastly, the Board found that since the employer's conduct has only a comparatively slight effect on employee rights, its reliance on a desire to enhance its bargaining leverage is a legitimate and sub-

298. *Id.* at 758-759.

299. 280 N.L.R.B. at 597-99. The decision was 3-1, with Chairman Dotson and Members Johansen and Babson in the majority and Member Dennis in dissent.

300. *Id.* at 598-99.

301. *Id* at 599-600.

stantial business justification sufficient to require proof of antiunion motive in order to sustain a violation of §8(a)(3).[302]

The District of Columbia Court of Appeals also analyzed *National Gypsum* under the inherently discriminatory doctrine.[303] The court determined that the employer's conduct was not inherently destructive, concluding, consistent with the Board's *Harter Equipment* analysis, that this finding is compelled by the Supreme Court decisions in *American Ship* and *Brown Food*.[304] As the effect of the employer's conduct was only comparatively slight, the employer's interest in bringing economic pressure to bear in support of its bargaining position is a legitimate and substantial business justification for its conduct.[305]

An analysis of the decisions reached in these two cases requires another look at the Court's holding in *American Ship*.[306] The Court noted that in the past the Board had classified lockouts based on the purpose behind the tactic. An employer lockout in response to union tactics which would interfere with legitimate managerial prerogatives - a defensive lockout - was deemed permissible by the Board. Lockouts designed to prevent plant seizures, sabotage, quickie strikes or to preserve the integrity of a multi-employer bargaining unit, were defensive in nature and therefore allowed.[307] Lockouts initiated by the employer solely as a means of bringing economic pressure to bear on the union or to preempt a union strike (where such a strike would not cause other than the normal disruptions to an employer's business which are the usual accompaniments to a strike) - an offensive lockout - were held by the Board to be prohibited by the Act as infringing on the collective bargaining rights of employees.[308]

The Court noted that the Board justified this classification, with its attendant distinction in treatment, on the basis of its "special competence to weigh the competing interests of employer and employees and to accommodate these interests according to its expert judgment."[309] The problem with the Board's analysis, according to the Court, was that its ability to weigh these competing interests rests upon a finding that the employer has engaged in both inherently discriminatory and inherently destructive conduct. Such a find-

302. *Id.* at 600.
303. 858 F.2d at 761.
304. *Id.* at 764.
305. *Id.* at 767.
306. 380 U.S. 300. *See supra* notes 115-33 and accompanying text.
307. *Id.* at 307.
308. *Id.* at 306-07.
309. *Id.* at 315.

ing was missing in this case. The Court found the employer's conduct neither inherently discriminatory nor destructive.[310]

The Court did not equate offensive and defensive lockouts for all purposes, nor did it hold that such distinctions are always irrelevant. It merely held that where the employer's conduct was neither inherently discriminatory nor destructive, there was no occasion for the Board to weigh competing interests. The lockout under consideration in *American Ship* was neither inherently discriminatory nor destructive, nor were lockouts per se specifically forbidden by the Act. Therefore the Board had no authority to find it violative of the Act in the absence of antiunion motive merely because the Board considered the lockout to be too powerful an economic weapon.[311]

The Court specifically reinforced *Erie Resistor*, stating that its holding in *American Ship* was "not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership. . .is required."[312] Thus, while an employer lockout, standing alone, is allowed (in the absence of antiunion animus), that is not to say that employer inherently discriminatory conduct engaged in in connection with a lockout could not create a situation inherently destructive of employee interests. The Court was presented with such a situation in *Brown Food*.[313]

In *Brown Food*, the Board held that an otherwise lawful defensive lockout was rendered unlawful by the hiring of temporary replacements for the locked out workers.[314] Not only was such conduct inherently discriminatory, it was also inherently destructive. The Supreme Court agreed that the conduct was inherently discriminatory - a finding it had not been willing to make in *American Ship* with regard to the lockout alone - but disagreed that the impact was inherently destructive. Having determined that the impact was comparatively slight, the Court required the employer to advance a legitimate business justification - a burden not placed on the employer in *American Ship*. At the very least, these cases suggest that not all lockouts are equal.[315] Under some circumstances an employer's conduct in connection with a lockout can be inherently discriminatory

310. *Id.*
311. *Id.* at 312-13, 317.
312. *Id.* at 311.
313. 380 U.S. 278. *See supra* notes 89-114 and accompanying text.
314. *Brown Food*, 380 U.S. at 280.
315. *Id.* at 289.

and require a justification.[316]

If all lockouts are not treated equally, then the fact that the use of temporary replacements during a defensive lockout under the particular facts of *Brown Food* had only a comparatively slight impact does not *a fortiori* lead to the same conclusion with regard to the use of temporaries under all circumstances. Therefore, it is necessary to determine whether the considerations which led the Court to find the impact comparatively slight in *Brown Food* would lead to the same conclusion in a case involving an offensive lockout.

The first fact which the Court considered in deciding the impact was the very fact that the use of replacements "was all part and parcel of respondents' *defensive* measure to preserve the multiemployer group in the face of the whipsaw strike."[317] The Court specifically relied upon the type of lockout in determining the impact of the conduct.[318]

Secondly, the Court refused to rely on the fact that the use of temporary rather than regular employees to perform the work implied a hostile motivation. The Court did not believe that the regular employees were actually willing to perform the work. It found the employees' motive to be a "desire to further the objective of the whipsaw strike."[319] Requiring the employer to give its regular employees the work under these circumstances in effect forces the employer "to aid[] and abet[] the success of the whipsaw strike."[320] In an offensive lockout situation, on the other hand, the employees do want to continue working and they are being denied work solely because they are presenting bargaining demands through a statutorily chosen collective bargaining representative.

The Court next noted that since replacements were only temporary, the regular employees could not have viewed them as threatening their jobs.[321] As the facts in *Harter Equipment* show, however, the use of temporary replacements in an offensive lockout context is not necessarily temporary in duration.[322] In *Harter Equipment*, the temporaries have been employed for five years, and, as the employer testified, "The only employees that I recognize now are those employees that are there, that are working at the company. . .nobody

316. *Id.* at 287.
317. 380 U.S. at 284 (emphasis added).
318. *Id.* at 283.
319. *Id.* at 285.
320. *Id.* The Board has long recognized that the employer is not required to finance a strike against itself. *See* General Electric Co., 80 N.L.R.B. 510 (1948).
321. 380 U.S. at 288.
322. *See* Harter Equip., Inc., 293 N.L.R.B. No. 79, slip op. at 2 (1989).

from five years ago."[323] Conduct can have an inherently destructive impact when it causes severe harm to employees, such as the loss of employment or valuable employment benefits.[324] The denial of an employment opportunity to employees willing to work clearly constitutes the loss of a valuable employment benefit.

The last two factors considered by the Court in *Brown Food* were the fact that union members, through their control of union policy, could end the dispute by agreeing to the employer's terms, and, the fact that the employer's proposals included a union security clause thus providing no incentive for employees to quit the union.[325] The analysis of these two issues by the Court was based on the then-current contours of the concepts of union membership and Section 7 rights, which concepts have been clarified, and more emphasis been placed on the right to refrain from union activity, since *Brown Food*.[326]

The Court in *Brown Food* failed to give sufficient consideration to the employees' right to refrain from union activity. In a lockout, the employer locks out the entire bargaining unit, not just the union members.[327] Unlike a strike, where those employees who do not agree with the union's demands can remain at work, in a lockout all employees, whether they agree with the union or not, are affected. Union members, moreover, are the only individuals who have the ability to control union policy - a situation implicitly acknowledged by the Court in its statement that "the *membership*, through its control of union policy, could end the dispute and terminate the lockout at any time simply by agreeing to the employers' terms. . . ."[328] Nonmembers have no such ability to control union policy and are unable to end the dispute outside of union channels since the employer is prohibited from engaging in direct dealing by bargaining individually with employees.[329] The effect of the lockout on nonunion employees, therefore, is to encourage them to join the union so that they may exercise some control over ending the lockout.

While the Court relied on the presence of a union security clause for finding that the employer's conduct could not have the

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323. *Id.* at 3.

324. *See supra* text accompanying notes 203-12.

325. *Brown Food*, 380 U.S. at 288-89.

326. *See* Communications Workers of America v. Beck, 487 U.S. 735 (1988); Pattern Makers' League of North America v. NLRB, 473 U.S. 95 (1985).

327. *See* Brown Food, 380 U.S. at 286 (implying that, if the employer locked out only union members, it would constitute inherently discriminatory and destructive conduct).

328. *Id.* at 289 (emphasis added).

329. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

effect of discouraging union membership since the employees "would have nothing to gain, and much to lose, by quitting the union,"[330] a union security clause does not require that employees maintain membership status in the union. It merely imposes an obligation to contribute financially to union activities related to collective bargaining.[331] The presence of a union security clause is legally irrelevant to whether or not an employee will become or remain a member of the union.[332] Employer conduct that would tend to discourage union membership will have that effect even where there is a union security clause.

As the Court's rationale for finding the impact of the employer's conduct in *Brown Food* to be comparatively slight can be distinguished from cases involving an offensive lockout with replacements, it is necessary to independently evaluate the circumstances in the latter situation to determine whether the impact of the conduct is inherently destructive.

Conduct is inherently destructive if it severely harms employees for exercising their rights or severely impacts on statutory rights.[333] The use of temporary replacements in conjunction with offensive lockouts has both effects. The employees lose a valuable employee benefit - the opportunity to be employed and earn wages. This opportunity is being denied to them because they have chosen a union to bargain on their behalf. Unlike a lockout alone, where no work is being performed and the employer's operation is shut down, when replacements are hired, there is work available which the regular employees are denied the opportunity to perform. Even if this lost opportunity does not last for years - as was the case in *Harter quipment*[334] - but only weeks or months, the loss of earnings is permanent and can never be recovered. Loss of employment would seem to be as inherently destructive as loss of a one-time vacation payment[335] or a tuition refund.[336]

The conduct also severely impacts on statutory rights. It significantly interferes with an employee's right to refrain from union membership. The only way to end the lockout is to reach agreement with the employer which can only be done through the union as bar-

330. *Brown Food*, 380 U.S. at 289.

331. *See* Communication Workers of America v. Beck, 487 U.S. 735 (1988); *see also* NLRB v. General Motors Corp., 373 U.S. 734 (1963).

332. *Id.*

333. *See supra* text accompanying notes 191-93.

334. 280 N.L.R.B. 597 (1986).

335. NLRB v. Westinghouse Elec. Corp., 603 F.2d 610 (1979).

336. New Orleans Pub. Serv., Inc., 197 N.L.R.B. 725 (1972).

gaining agent for the employees. If an employee desires to influence the union, he needs to be a union member so that he can participate in shaping union policy.

The employer's conduct also impacts on the right to strike. Whereas a lockout alone only affects the timing and duration of the strike, a lockout with replacements renders the right to strike illusory. With a lockout only, the employer is effectively shut down - the same effect accomplished by a strike; only the timing of the shutdown and its duration is taken away from the employees. A lockout with replacements, however, prevents the employees from accomplishing the purpose of a strike *in toto* - the employer's operation continues uninterrupted.

Most importantly, the lockout with replacements severely impedes the right to engage in collective bargaining - the central purpose for which the Act was passed, other rights contained in the Act being means to effectuate that purpose. When and if the lockout ends, how will it effect the future willingness of employees to present their demands through a union? The employees have witnessed firsthand the results of engaging in collective bargaining through a union. They are thrown out of work and can only return when they agree to the employer's proposals. It makes no sense to have a union bargaining agent and lose wages when the end result is the same as when no union is present. In the latter case they work under the employer's terms but there is no interim loss of work. Although employees lose wages during a strike and sometimes lose the strike, capitulating to the employer's terms, it is a voluntary decision on the employees' part to engage in the strike as part of the collective bargaining process. A lockout with replacements, on the other hand, is seen by the workers as the imposition of punishment for engaging in collective bargaining.

Thus, because of the severe impact on the employees and on the exercise of statutory rights, an offensive lockout coupled with the use of temporary replacements is inherently destructive. Once this conclusion is reached, the Board is then confronted with the relatively easy task of deciding whether the employer's desire for bargaining leverage outweighs the inherently destructive impact of the conduct. This balance has already been struck and the answer is a resounding no. Even the court in its decision in *National Gypsum* noted that justification based on bargaining leverage is sufficient to condone an employer's discriminatory conduct *if* it does not have an inherently

destructive impact.[337]

Applying the inherently discriminatory doctrine to *Harter Equipment* and *National Gypsum* requires the conclusion, contrary to that reached by the respective tribunals, that an employer offensive lockout with the use of temporary replacements constitutes inherently discriminatory conduct having an inherently destructive impact on employee rights and cannot be justified merely by the employer's desire to gain bargaining leverage during negotiations. Such conduct violates §8(a)(3).

IV. CONCLUSION

The inherently discriminatory doctrine has been well developed through a series of Supreme Court cases beginning with *Radio Officers* and was best summarized in the Court's opinion in *Great Dane*.[338] Employer conduct which is inherently discriminatory carries its own indicia of intent. The employer is held to have intended the reasonably foreseeable consequences of its conduct. When the impact of inherently discriminatory conduct on employee rights is comparatively slight, the employer can justify its conduct by producing evidence of a legitimate and substantial business justification. Such a justification undermines the inference of hostile motive, and a specific finding of antiunion animus is required in order to find that the employer's conduct violated §8(a)(3).[339] If the impact of the conduct is inherently destructive, however, a finding of a violation of §8(a)(3) can be sustained even in the face of employer proof of a legitimate and substantial business justification if it is determined that the harm to employee rights outweighs the proffered justification.[340]

Understanding this doctrine requires a grasp of certain key concepts. Inherently discriminatory conduct is that conduct which, on its face, makes a difference in treatment among employees based on the exercise of §7 rights. This difference in treatment can manifest itself simultaneously, sequentially or through adverse impact. The effect of inherently discriminatory conduct is inherently destructive when it either severely harms an employee by causing the loss of a valuable employment benefit, or by granting an employment benefit, because of the exercise by the employee of his statutory rights, or

337. International Bhd. of Boilermakers v. NLRB, 858 F.2d at 768.

338. 388 U.S. 26 (1967).

339. *Id.* at 33 (stating that "the finding of a violation [of 8(a)(3)] normally turns on whether the discriminatory conduct was motivated by an antiunion purpose.").

340. *Id.* at 33-34.

significantly impedes or frustrates the exercise of a statutory right.

The justification offered for such conduct must be both substantial and legitimate. A justification is substantial if it is nonfrivolous - reasonable and not based on speculation. A justification is legitimate if it generally falls into one of three categories: managerial prerogatives, desire to gain bargaining leverage, or effectuation of a statutory policy.

There are no clear guidelines instructing the Board in its job of balancing interests. What is required is an analysis and weighing, based on the Board's specialized expertise, of the competing interests, in light of national labor policy and the complexities of industrial reality.

Applying the inherently discriminatory doctrine to situations involving offensive lockouts with the use of temporary replacements leads to the conclusion that such conduct is both inherently discriminatory and destructive and that the employer's desire to achieve greater leverage in collective bargaining negotiations is insufficient to outweigh the harm done to important employee rights.